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Office Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 26

THE UNITED STATES,

Petitioner,

MISSISSIPPI VALLEY GENERATING COMPANY,

On Its Own Behalf and To the Use of Others,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

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TABLE OF CONTENTS.

QUESTION PRESENTED	PAGE
QUESTION PRESENTED	1
STATUTE INVOLVED	3
STATEMENT	3
I. Introduction	3
II. Controlling Facts	11
A. Wenzell had nothing to do with the origin of the contract, or with the decision by either sponsoring company to participate in the power arrangements proposed by the Administration	11
B. Wenzell's activities as a Budget Bureau con- sultant related primarily to the February 25 proposal, which was rejected by the Gov- ernment shortly after Wenzell's active par- ticipation as a Government consultant ended	12
1. The only concern of the Budget Bureau in connection with the project was to deter- mine as quickly as possible whether a proposal was possible which would meet the Bureau's fiscal standards. From the beginning it was decided that the AEC would be the contracting and, therefore, the negotiating agency	12
2. Wenzell's activities as a Budget Bureau consultant prior to the submission of the February 25 proposal "related primarily to the cost of money" and, secondarily, to staying in touch with the sponsors as a kind of "expediter"	13

3. All Wenzell's activities in connection with the February 25 proposal, including those relating to the sponsors and First Boston, were part of his assigned job as a Budget Bureau consultant..... 17
4. Wenzell's active participation as a Budget Bureau consultant ended just prior to the time petitioner rejected the February 25 proposal on the basis of analyses by Adams and staffs of the AEC and TVA 19
- C. Wenzell did nothing as a Bureau consultant with respect to the April 10 proposal except to confirm the information on the probable cost of money..... 21
 1. Wenzell's consultancy ended before the sponsors even began to draft the April 10 proposal and his only activities relating thereto were to confirm advice theretofore given on the probable cost of money..... 21
 2. It was the April 10 proposal which later served as the basis for beginning negotiation of the contract—not the rejected February 25 proposal..... 23
- D. Wenzell's activities as a Budget Bureau consultant are both *de minimis* and irrelevant and immaterial, because he did nothing of any significance in connection with the contract upon which suit was brought and judgment entered 26
 1. Petitioner did not even decide to commence contract negotiations until approximately two and one-half months after Wenzell's Bureau consultancy ended and

only after petitioner made an intensive review of the April-10 proposal and of a competing proposal submitted by the Von Tresckow group..... 29:

2. Wenzell had nothing to do with the "lengthy, arduous and hotly contested" negotiations between the AEC and respondent beginning on July 7, 1954, and concluding on November 11, 1954—over seven months after Wenzell's Budget Bureau consultancy terminated..... 30

3. The "Power Contract was negotiated, executed, and has been administered with an extraordinary measure of disclosure to the Congress and the public"..... 32

E. First Boston was retained as one of MVG's financial agents only after Wenzell's Budget Bureau consultancy ended; and there was no agreement or understanding relating to such retainer prior to that time..... 34

1. During the period of Wenzell's Government consultancy there was no understanding or agreement of any kind regarding the retention of First Boston as MVG's financial agent..... 34

2. First Boston was retained "for good business reasons" as one of MVG's financial agents, after Wenzell's Budget Bureau consultancy ended..... 35

F. Wenzell performed his duties as a Budget Bureau consultant faithfully, diligently and honestly 39

SUMMARY OF ARGUMENT

42

ARGUMENT:

- I.—The decision of the court below, on the facts as found, establishes a demanding precedent within the letter and spirit of 18 U. S. C. 434 requiring the highest standards of integrity and fidelity in the federal contracting process 44
- II.—Wenzell was not “an officer or agent of the United States for the transaction of business” in connection with the contract within the meaning of 18 U. S. C. 434..... 48
- III.—Wenzell was not “directly or indirectly interested” in the contract during the time he was a Budget Bureau consultant..... 53
- IV.—In any event the issue in this case is not solely whether Wenzell is guilty of violation of 18 U. S. C. 434. The petitioner must also establish that, on all the facts as found by the court below, public policy requires that the Court declare this concededly fair and honest contract unenforceable by respondent..... 61
- A. Courts will not add a sanction of contract unenforceability to those imposed by Congress in a penal statute such as 18 U. S. C. 434 unless the alleged illegality is so inherent in the contract or the cause of action that the contract cannot be enforced without giving judicial sanction to the unlawful act 63
1. Congress deliberately refrained from including a blanket sanction of unenforceability in 18 U. S. C. 434..... 63

2. This Court has repeatedly held that a sanction of unenforceability will not be added to a penal statute unless absolutely required by considerations of public policy which are manifest on the facts of a particular case..... 65
 3. The cases cited by petitioner show that a sanction of unenforceability will be invoked only when the illegality is inherent in the contract itself or where enforcement would enable the wrongdoer to profit by his own wrong..... 67
 4. So far as the municipal cases cited by petitioner are relevant at all, they merely add support to the foregoing principles 69
 5. The principles which would permit recovery by respondent here have been consistently applied whenever the United States has sought to avoid a contractual obligation on the ground of an alleged violation of 18 U. S. C. 434.... 71
- B. On the facts in this case, when considered in the light of the foregoing principles of law, it is plain that public policy requires that the contract in suit be enforced..... 79
- C. Refusal of enforcement of a fair and honest Government contract such as that at bar would be neither as effective nor as reasonable a remedy for the protection of the United States as that prescribed by Congress in 18 U. S. C. 434..... 82

D. The steps taken by the sponsors, Wenzell and his Government superiors to bring about the timely termination of his consultancy followed the procedures prescribed by the current regulations of the Department of Justice, as well as the AEC and the Bureau of the Budget.....

83

V.—In any event, respondent is entitled to recover the reasonable cost of its services as found by the court below, since the direct result of those services was to save petitioner a capital expenditure of over \$100,000,000.....

91

CONCLUSION

93

CITATIONS.

Cases:

	PAGE
<i>A. B. Small Co. v. Lamborn & Co.</i> , 267 U. S. 248.....	65
<i>Architects Building Corp. v. United States</i> , 98 Ct. Cl. 368 (1943).....	50, 71, 72
<i>Bank of the United States v. Owens</i> , 27 U. S. 338 (2 Pet. 527).....	68
<i>Bartley, Inc. v. Town of Westlake</i> , 237 La. 413, 111 So. 2d 328 (1959).....	51, 70
<i>Bissell Lumber Co. v. Northwestern Casualty & Surety Co.</i> , 189 Wisc. 343, 207 N. W. 697 (1926).....	58
<i>Bruce's Juices, Inc. v. American Can Co.</i> , 330 U. S. 743.....	65, 66
<i>Burck v. Taylor</i> , 152 U. S. 634.....	67
<i>City of London Electric Lighting Co. v. London Corp.</i> , [1903] A. C. 434 (House of Lords).....	69
<i>City of Northport v. Northport Townsite Co.</i> , 27 Wash. 543, 68 Pac. 204 (1902).....	51, 58, 69
<i>Cobble Close Farm v. Board of Adjustment</i> , 10 N. J. 442, 92 A. 2d 4 (1952).....	52
<i>Connolly v. Union Sewer Pipe Co.</i> , 184 U. S. 540.....	65
<i>Continental Wall Paper Co. v. Voight & Sons Co.</i> , 212 U. S. 227.....	65
<i>Crocker v. United States</i> , 240 U. S. 74.....	45
<i>Curved: Electrotypé Plate Co. v. United States</i> , 50 Ct. Cl. 258 (1915).....	71, 72
<i>D. R. Wilder Mfg. Co. v. Corn Products Refining Co.</i> , 236 U. S. 165.....	65
<i>Deitrick v. Greaney</i> , 309 U. S. 190.....	68
<i>Duncan v. City of Charleston</i> , 60 S. C. 532, 39 S. E. 265 (1901).....	70
<i>Escondido Lumber Co. v. Baldwin</i> , 2 Cal. App. 606, 84 Pac. 284 (1906).....	57, 60
<i>Ewert v. Bluejacket</i> , 259 U. S. 129.....	51, 68

<i>Federal Communications Commission v. American Broadcasting Co.</i> , 347 U. S. 284.....	59
<i>Finch v. Riverside & A. Ry.</i> , 87 Cal. 597, 25 Pac. 765 (1891)	69, 70
<i>Fredericks v. Borough of Wanaque</i> , 97 N. J. L. 165, 112 Atl. 309 (1920).....	56
<i>Fritts v. Palmer</i> , 132 U. S. 282.....	65
<i>Frost & Co. v. Mines Corp.</i> , 312 U. S. 38.....	65
<i>Geddes v. Anaconda Copper Mining Co.</i> , 254 U. S. 590	65
<i>Gillen Co., Edward E. v. Milwaukee</i> , 174 Wisc. 362, 183 N. W. 679 (1921).....	51, 52, 61, 70
<i>Hardy v. Mayor, etc. of City of Gainesville</i> , 121 Ga. 327, 48 S. E. 921 (1904).....	70
<i>Hazelton v. Sheckells</i> , 202 U. S. 71.....	46
<i>Hobbs, Wall & Co. v. Moran</i> , 109 Cal. App. 316, 293 Pac. 145 (1930).....	51, 70
<i>Ingalls v. Perkins</i> , 33 N. M. 269, 263 Pac. 761 (1927)	50
<i>Kelly v. Kosuga</i> , 358 U. S. 516.....	65
<i>Kimen v. Atlas Exchange National Bank</i> , 295 U. S. 215	68
<i>Lésieur v. Rumford</i> , 113 Me. 317, 93 Atl. 838 (1915)	51, 70
<i>Loughran v. Loughran</i> , 292 U. S. 216.....	80
<i>Mammoth Oil Co. v. United States</i> , 275 U. S. 13....	45
<i>Metcalf & Eddy v. Mitchell</i> , 269 U. S. 514.....	48
<i>Michigan Steel Box Co. v. United States</i> , 49 Ct. Cl. 421 (1914)	45
<i>Miller v. Ammon</i> , 145 U. S. 421.....	67
<i>Miller v. City of Martinez</i> , 28 Cal. App. 2d 364, 82 P. 2d 519 (1938).....	69
<i>Mississippi Valley Generating Company, Matter of</i> , 36 S. E. C. 159 (1955).....	27
<i>Muschany v. United States</i> , 324 U. S. 49.....	46, 48, 71, 74, 75, 76, 77, 78, 82
<i>National Bank v. Matthews</i> , 98 U. S. 621.....	65

	PAGE
<i>Nunemacher v. Louisville</i> , 98 Ky. 334, 32 S. W. 1091 (1895)	51, 70
<i>Pan American Co. v. United States</i> , 273 U. S. 456	45
<i>Panozzo v. City of Rockford</i> , 306 Ill. App. 443, 28 N. E. 2d 748 (1940)	57
<i>People v. Southern Surety Co.</i> , 199 Mich. 30, 165 N. W. 769 (1917)	57
<i>Prosser v. Finn</i> , 208 U. S. 67	51, 68
<i>Rankin v. United States</i> , 98 Ct. Cl. 357 (1943) 51, 71, 72, 73	
<i>Schaefer v. Berinstein</i> , 140 Cal. App. 2d 278, 295 P. 2d 113 (1956)	70
<i>Shaw & Hodgins v. Waldron</i> , 55 Wash. 271, 104 Pac. 272 (1909)	69
<i>Stockton Plumbing & Supply Co. v. Wheeler</i> , 68 Cal. App. 592, 229 Pac. 1020 (1924)	51, 70
<i>Tool Co. v. Norris</i> , 69 U. S. (2 Wall.) 45	46
<i>United States v. Carter</i> , 217 U. S. 286	45
<i>United States v. Chemical Foundation, Inc.</i> , 272 U. S. 1	71, 73
<i>United States v. Grace Evangelical Church</i> , 132 F. 2d 460 (7th Cir. 1942)	71, 74, 76, 78
<i>United States v. Hartwell</i> , 73 U. S. 385	48
<i>United States ex. rel. Marcus v. Hess</i> , 317 U. S. 537	58, 59
<i>Van Itallie v. Borough of Franklin Lakes</i> , 28 N. J. 258, 146 A. 2d 111 (1958)	61
<i>Waskey v. Hammer</i> , 223 U. S. 85	51, 68
<i>Watson v. City of New Smyrna Beach</i> , 85 So. 2d 548 (Fla. 1956)	69
<i>Wayman v. City of Cherokee</i> , 204 Ia. 675, 215 N. W. 655 (1927)	57
<i>Yonkers Bus, Inc. v. Maltbie</i> , 23 N. Y. S. 2d 87 (Sup. Ct. Albany County 1940), aff'd, 260 App. Div. 893, 23 N. Y. S. 2d 91 (3d Dep't 1940)	51, 61

Statutes

PAGE

Atomic Energy Act of 1954, 68 Stat. 951, 42 U. S. C. §2204, Section 164.....	28, 32, 34
National Defense Act of 1940, 54 Stat. 713 (July 2, 1940)	75, 76
12 Stat. 578 (July 16, 1862).....	64
12 Stat. 696 (Feb. 25, 1863).....	64
12 Stat. 698-99 (Mar. 2, 1863).....	64
18 U. S. C. 216.....	63, 64, 75
18 U. S. C. 281.....	75
18 U. S. C. 434.....	3, 10, 11, 26, 32, 42, 43, 44, 45, 46, 48, 49, 54, 61, 62, 63, 64, 65, 66, 69, 71, 73, 74, 75, 76, 77, 78, 79, 82, 90

Miscellaneous:

Atomic Energy Commission Manual, Chap. 4124, "Conduct of Employees" (1954).....	84
Bureau of the Budget Manual, Section 810, "Establishment and Observance of Standards of Conduct" (1954)	84
<i>Compilation of Certain Memoranda Prepared by the Office of the Senate Legislative Counsel on Conflict of Interest Statutes, Senate Committee on Armed Services, 84th Cong., 1st Sess. (1955)</i>	49
<i>Cong. Globe, 37th Cong., 2d Sess., p. 2958 (1862)....</i>	64
6 Corbin, <i>Contracts</i> , §1529 (1951).....	80
II Corinthians, iii, 6.....	46
Department of Commerce, Order No. 77, "Conflicts of Interest and Private Business Activities of Officers and Employees" (1955).....	85
Department of Defense, Memorandum: "Conduct of Personnel Assigned to Procurement and Related Agencies" (1957).....	85
Department of Justice, Order No. 145-57, "Standards of Conduct Relating to Personal Business Interests, Transactions and Other Dealings of Employees" (1957)	84

<i>Exemptions from Conflict-of-Interest Statutes in Defense Employment</i> , Hearings before the Military Operations Subcommittee of the House Committee on Government Operations, 86th Cong., 2d Sess. (1960).....	85
<i>Exercise of Statutory Requirements under Section 164, Atomic Energy Act of 1954</i> , Hearings before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess. (1954).....	32
Federal Communications Commission, FCC 54-1176, "Policy Statement Relating to the Review and Inspection Program for Detection and Prevention of Improper Conduct of Employees of the Federal Communications Commission" (1954)	85
Federal Trade Commission, Personnel Bulletin No. 12, "Conflict of Interest" (1957).....	85
Hearings before the Joint Committee on Atomic Energy on S. 3323 and H. R. 8862, 83d Cong., 2d Sess. (1954).....	32
<i>Legislative History of the Atomic Energy Act of 1954 (Public Law 703, 83d Cong.)</i> , Atomic Energy Commission, Vols. I, II and III (Washington, 1956)	28
Mechem, <i>Outlines of the Law of Agency</i> , § 12 (4th ed: 1952)	49
40 Ops. Att'y Gen. 168.....	50
<i>Power Policy, Dixon-Yates Contract</i> , Hearings before a Subcommittee of the Committee on the Judiciary, 83d Cong., 2d Sess. (1954).....	32
Restatement (Second), <i>Agency</i> § 12 (1958).....	49
Securities and Exchange Commission, Manual of Administrative Regulations, Section 701, "Conduct Regulation" (1956).....	85

	PAGE
<i>The Wall Street Journal</i> , July 7, July 8, July 13, July 27, August 3, and August 24, 1960.....	16
Webster's New International Dictionary (2d ed.)	49
5 Williston, <i>Contracts</i> . (Rev. ed. 1937) :	
§ 1628	76
§ 1630	68
6 Williston, <i>Contracts</i> , § 1735 (Rev. ed. 1938).....	57

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THE UNITED STATES,

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v.

MISSISSIPPI VALLEY GENERATING COMPANY, On Its Own
Behalf and To the Use of Others,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

QUESTION PRESENTED:

The United States is a party to a contract negotiated for it by the Atomic Energy Commission. The unanimous Findings of the court below are that it was negotiated in sessions which were lengthy, arduous and hotly contested, that such negotiations lasted from July 7 to November 11, 1954, a period of over four months, and that the representatives of the Atomic Energy Commission who negotiated the contract were competent and aggressive, with no one claiming that they lacked a singleness of purpose in representing the

interests of the Government. Over six months before these negotiations began, the Government determined, as a matter of policy, to seek a way to eliminate from the budget an item of over \$100,000,000 for the construction of a power plant by the Government. To this end, the Bureau of the Budget undertook to get the contractor's sponsors to submit a proposal for the construction of such a plant which could serve as a starting point for negotiations and justify the elimination of this item from the budget. While doing so, the Bureau had as an unpaid consultant a man who was an officer and stockholder of an investment banking firm, as the Bureau of the Budget was fully aware. The unpaid consultant had no legal relationship with or interest in the contractor or its sponsors. The unpaid consultant engaged in no act to bind the Government or to make decisions on its behalf and had no power or authority to do so. He did not participate in the negotiation of the contract and did not even participate in the Government's decision to begin those negotiations. He terminated his consultancy long prior to such decision and negotiations, and this came about as the result of the prompt and effective steps taken by the contractor's sponsors. Neither he nor the investment banking firm with which he was connected, and which was retained by respondent as one of two financial agents after the unpaid consultant had terminated his Government connection, has any interest in this lawsuit. It is agreed that the unpaid consultant performed his duties for the Government faithfully, honestly and diligently. It is also agreed that the contract was fair and honest and that the entire proceedings were free from fraud and corruption. Eight months after the contract was executed, and after its primary budgetary purpose had been accomplished, a third party offered to build the required plant without cost to the Government. The Government therefore can-

celled the contract. Under such circumstances may the Government repudiate its obligations under the contract on the ground that the unpaid consultant had an alleged conflict of interest?

STATUTE INVOLVED.

18 U. S. C. 434 provides as follows:

“Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both.”

STATEMENT.

I. Introduction.

This is essentially a fact case. That it is such is testified to by the 246 numbered paragraphs of Findings covering 186 printed pages, by the 25 printed pages required for the petitioner to state the case even with selected omissions, and by the nature of the opinions below.

Petitioner's statement of the facts is set forth with such apparent fairness as to be disarming. Only in the light of two important considerations does one become aware that this apparent frankness is only an added example of what has gone on in this case ever since the Administration decided to attempt to rid itself of the political problem it had created by tossing the problem over to the judiciary (F. 128, R. 118). These two considerations are: first, that there are significant omissions and misleading implications

in the statement of facts; and, second, that the draftsman of the portion of petitioner's brief headed "Argument" apparently has not been introduced to the draftsman of its "Statement" of facts. These omissions and misleading implications will be specifically shown in the statement below and in our argument.

We are therefore compelled to restate the facts—as unanimously found—in order that this case may be decided on the basis of those facts.

The Court of Claims found without dissent* that respondent Mississippi Valley Generating Company (herein called "MVG") and its creditors (the "use-plaintiffs," who are also respondents here) had incurred certain expenses** in performance of the terms of the contract involved in this action. The judgment now sought to be attacked is a judgment for those expenses alone, since MVG did not seek or recover any element of profit.

The only issue in this case is the validity and enforceability of the power contract. In considering petitioner's so-called conflict-of-interest defense, it must be remembered that petitioner cancelled the contract, not because of any alleged conflict of interest on the part of Adolphe Wenzell or anyone else, but because, after the power contract had accomplished the Government's primary purpose of eliminating from the budget an appropriation of \$100,000,000, the Government determined it would have no need for the power to be generated by respondent's plant (F. 206, R. 192-93).

* Although two judges wrote dissenting opinions, there was no dissent to these Findings. Likewise, petitioner states that it does not challenge the court's Findings of Fact (Pet. Br., p. 3).

** Some of these expenses had been paid by respondent before this action was brought; most had not. It is the unpaid creditors to whom such expenses were owed who are joined as "use-plaintiffs" in the action.

As the court below stated:

"The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skillful bargaining by representatives of the Government who had complete fidelity to their trust, and which became useless to the Government only because of the intervention of a *force majeure*, the decision of the City of Memphis to generate its own power" (R. 17).*

The Findings of Fact demonstrate that the petitioner has raised the irrelevant and fallacious smoke screen regarding one Adolphe Wenzell, not to protect the Government as it piously reiterates throughout its brief, but simply to escape reimbursing respondent for the expenses respondent incurred while using its best efforts to have a power plant ready on the tight time schedule set by the petitioner.**

The contract was not a contract born of the desire of MVG or its sponsors for Government business. It was a contract initiated by the Government (Pet. Br., p. 5, Fs. 36-

* Petitioner has reaffirmed its concession here: "the final contract with respondent turned out to be fair and honest" (Pet. Br., p. 59; see also Pet. Br., p. 29).

** That this is so is apparent from the other defenses, now abandoned, against which respondent had to contend in the trial. Each of these defenses was unanimously, almost summarily, rejected by the court below. Prior to respondent's lawsuit, petitioner's highest legal officers and principal administrative agencies had given formal opinions and decisions rejecting, and in some instances scornfully pointing up the fallaciousness of, various arguments which petitioner then solemnly turned around and asserted as affirmative defenses in this lawsuit. (See Fs. 152, 173, 187-189 and 203, R. 140-43, 157-61, 182-83, 187-90.) Indeed, the Department of Justice in its *Amicus Curiae* brief on behalf of the United States filed with the Court of Appeals for the District of Columbia on appeal from the SEC order approving respondent's equity financing for purposes of this contract, labeled some of the very arguments the same Department of Justice made in this lawsuit as a "stale rehash" and a position of "essential emptiness" (F. 152(e), R. 142-143).

43, R. 63-69). The origin of the contract has been well stated by petitioner itself:

"To avoid the heavy capital outlay which would be required to finance further TVA facilities, and for reasons of general Administration policy, the Bureau of the Budget desired to relieve TVA by requiring the AEC to purchase some of its power from private utilities (Fs. 23, 36, R. 57, 63-64)" (Pet. Br., p. 4).

The sponsors "were ready and willing to do anything possible, without regard to profit, to help with the problem of furnishing power" (F. 51, R. 73) or to make a contract to supply power "at whatever cost the Federal Power Commission deemed fair" (F. 51, R. 74). Moreover, the sponsors thought that the approach to the problem—i.e., dealing through AEC rather than directly with TVA—was awkward, but despite their protestation this approach was decided upon by the Administration (F. 51, R. 74).

The Budget Bureau then took on Wenzell as a part-time consultant without compensation and asked him to stay in touch with the sponsors as a kind of "expediter," as the court below found, "to keep their [the sponsors'] interest alive and to get it into the form of a proposal which the Government could consider" (R. 13).

Wenzell, the alleged double dealer, was not used by the Government at the request of the sponsors; in fact, they protested his presence and warned that it might prove to be embarrassing (Pet. Br., pp. 18-19, 21; Fs. 68, 78, R. 84-85, 91-92). The sponsors knew that in the controversy over the general Administration policy in favor of investor-owned power as against Government-owned power, all kinds of fighting—even unfair fighting—would go on. As the court below accurately stated the matter (R. 16-17):

"The sponsors, though they had not employed Wenzell, nor given him any interest in their enter-

prise, were the first to see the possibility that criticism might be directed at Wenzell's activities. They, rightly as it seems to us, saw the problem not as a conflict of interests problem but as a political public versus private power problem which presaged a fight with no holds barred. They in effect told Wenzell that he ought to get out. They could not fire him because they hadn't hired him. Wenzell reported the sponsors' admonition to Hughes [then Assistant Director, and later Director, of the Bureau of the Budget], who saw no reason for alarm and kept on assigning tasks to Wenzell, and to First Boston, which obtained advice of counsel that Wenzell ought to get out, but did not follow it up by getting him out. So the two entities that had the power to remove Wenzell from the scene, the Government and First Boston, did not do so, and the entity that urged his removal but had no power to effect it, is sought to be made the victim of his nonremoval. Wenzell is sought to be assigned the role of a fifth-column, a secret weapon fortunately though without evil purposes planted by the Government, but adequate to destroy the enemy if it became necessary to resort to such a weapon. There is, it seems to us, something essentially cynical about the Government's Wenzell defense."

Eventually, about eight months after the contract was made and the appropriation for a Government plant had been eliminated, the Government concluded it no longer had any need for the contract. This came about because the City of Memphis decided to generate its own power, thereby eliminating the problem of TVA's need for additional power which the Government had asked the respondent's sponsors to come in and solve for it—a problem which they in good faith and with great effort and expenditure of money and time had set about solving. Thus the Government, for its own business reasons, cancelled the contract.

Thereafter, when the political atmosphere became too hot for that same Government which had urged the sponsors to help—and for the very reasons about which the sponsors had warned the Government—the Government piously announced that the contract would not be recognized because of a question as to conflict of interest resulting from the Government's use of Wenzell. An election year was coming up and the whole problem was passed over to the courts.*

Petitioner contends MVG's contract should not be recognized because of a supposed violation of a criminal statute, not by MVG or its sponsors, but by Adolphe Wenzell. Despite such grave charges, petitioner bases its entire case on assumptions and inferences relating to Wenzell which, in turn, are based on a disregard and even distortion of the facts as found by the court below. Nor has any proceeding ever been instituted against Wenzell on such charges.

The insignificance of Wenzell's role in the contracting process is apparent from petitioner's own Statement at pages 4 through 9 of its brief. All the important facts relating to the contract are set forth on these pages of petitioner's brief. Yet there is no mention of either Wenzell or First Boston. The role of Wenzell was, despite petitioner's contention to the contrary, *de minimis*.

Wenzell's name, of course, appears often in the Findings, because he was the principal excuse of the Government in its attempt to avoid payment of its obligations

* Petitioner's brief (p. 25) refers to "the AEC's declaration that the contract was not valid." There never was any such declaration. What did come out of the AEC was the following timid conclusion by its General Counsel: "My conclusion is that there is a substantial question as to the validity of the contract which can only be settled in the courts" (F. 128, R. 118).

under the power contract. But although the Findings repeat Wenzell's name often for that reason, they also disclose the large number of important Government officials who took action and made decisions. Wenzell is not among them.

Wenzell's principal functions, as directed by Hughes, were to get estimates of future interest costs from First Boston and relay them to the Bureau of the Budget and the sponsors and from time to time to carry messages from Hughes to the sponsors to the effect that they should hurry with their proposals. On one occasion Nichols of the AEC suggested to Wenzell that he encourage the sponsors to refine their figures (F. 98, R. 101), but there is no finding and there was no evidence that he ever did so. In fact, the sponsors had already been told to do just that earlier the same day and in Wenzell's presence (F. 97, R. 100-01). Wenzell's insignificance on other matters appears from the findings that on March 9 Dodge was told by Wenzell that he was not qualified to advise the Bureau on matters of overall costs and suggested for this function Adams, Chief of the Bureau of Power of the FPC (F. 85, R. 95), from Wenzell's reiteration of this suggestion on March 15 when the question came up again (F. 89, R. 97-98), and from his previous response, to a Bureau request, that he was not qualified to answer questions about power engineering (F. 74, R. 89).

Wenzell was not a significant person in this transaction; he did not play a significant role; and despite the statements in Mr. Justice Reed's dissent and petitioner's brief that he "negotiated," he did not negotiate either for the Government or for the sponsors. The Findings are clear as to this and they reflect a record in which the Government had every advantage for proving a favorable case.

The fact is, as Judge Madden stated below (R. 13):

"Wenzell had substantially nothing to do with the substance of the contract."*

As will be shown hereafter, petitioner has not proved even one of the basic elements necessary to establish the commission by Wenzell of a crime under 18 U. S. C. 434. Nor has anyone shown that the sponsors or any of the respondent's other representatives were guilty of any unlawful conduct or acted in any way not in accord with public policy. On the contrary, it is difficult to imagine a case in which there was as much disclosure and as much good faith and evidence of complete lack of fraudulent intent on the part of everyone concerned, both in and out of the Government, as was present in the months prior to the time the Government even decided to negotiate a contract with respondent. This is particularly so when one considers the fact that it was the efforts of the sponsors themselves which led to the termination of Wenzell's services with the Government before any possible conflict could exist, and many months before the petitioner and respondent were finally able to reach an agreement on the contract.

As Judge Bryan stated in his concurring opinion:

"The very law points now mooted to defeat the contract as unauthorized were originally vouched by the Government to conclude it. These remain

* Compare the statements in petitioner's brief on pages 2, 34, 44 and 50 that Wenzell was himself a "significant" person or played a "significant role" with regard to the contract.

Another phase of petitioner's adjectival attack is its reference to the preliminary discussions as "crucial" (Pet. Br., p. 45) and to a particular meeting on January 20, 1954, as both "crucial" (Pet. Br., p. 13) and "important" (Pet. Br., p. 22). These assertions are to be contrasted with the findings that these meetings were, as the record shows, mere "exploratory discussions" (F. 45, R. 70). And the one of January 20 was one in which Wenzell was expressly found to have sat mute (F. 52, R. 75).

unbowed. Besides, *admittedly* every act now pleaded to impugn the contract, as the opinion of the court also well recounts, was 'begun, continued and ended' in good faith and in the full knowledge of the Government. *In truth there was no imposture*" (R. 31).*

On petitioner's own theory, the duty to pay the amounts owed under this contract cannot be avoided except by a determination that there was a violation by Wenzell of 18 U. S. C. 434, a penal statute containing no reference to the enforceability of contracts, and a further determination that this violation somehow bars recovery by the respondent. In light of this, it is extremely important to consider the facts as found by the court below rather than exhortations and generalities as to the validity and necessity of conflict-of-interest statutes—matters as to which there is no controversy.

For this reason we have deemed it necessary to set forth below those controlling facts which demonstrate, without more, that there was no violation of 18 U. S. C. 434 which could invalidate the contract.

II. Controlling Facts.

- A. Wenzell had nothing to do with the origin of the contract or with the decision by either sponsoring company to participate in the power arrangements proposed by the Administration.

The origin of the contract has been accurately stated by petitioner at pages 4-5 of its brief under the heading "The Purpose of the Contract."

It is undisputed that Wenzell had nothing to do with the determination of general Administration policy or the specific decisions relating to the origin of the contract as

* Emphasis supplied throughout the brief unless otherwise indicated.

set forth in petitioner's brief at pages 4-5. These policies and decisions were made either prior to his 1953 consultancy (F. 22, R. 56-57) or during a time when Wenzell had no contact with any representative of either the sponsors or the petitioner (Fs. 33, 34, 36, 37, 38, 40, 41, 43, 44, 45, 51, R. 62-63, 64-65, 66, 67-68, 69, 70, 73-75).

Furthermore, insofar as Wenzell's 1953 Budget Bureau consultancy was concerned, he was not consulted on any policy matters connected with the Budget Bureau in 1953 (F. 33, R. 62-63). As petitioner states, the recommendations in his study "were not a factor in the decision by the Budget Bureau that AEC should seek a contract with private utility companies" (Pet. Br., p. 10, Fs. 33, 34, R. 62-63).

Wenzell had no connection with the decision by either sponsoring company to participate in the power arrangements proposed by the Administration (Fs. 39, 43-44, 65-66, 140, R. 66-67, 69-70, 80-81, 124-25).

B. Wenzell's activities as a Budget Bureau consultant related primarily to the February 25 proposal, which was rejected by the Government shortly after Wenzell's active participation as a Government consultant ended.

- 1. The only concern of the Budget Bureau in connection with the project was to determine as quickly as possible whether a proposal was possible which would meet the Bureau's fiscal standards. From the beginning it was decided that the AEC would be the contracting and, therefore, the negotiating agency.**

Wenzell acted as a consultant only to the Budget Bureau. Thus, his activities as such consultant must be considered in the light of the nature of the Budget Bureau's interest in the project. The Findings state that the function of the Budget Bureau in connection with the project in 1954 was to determine whether "(1) the cost of the power to be con-

tracted for by AEC would be reasonable in relation to the cost of other power used by AEC, and (2) the cost of power under any proposal could be reconciled with the estimated cost of power from the proposed TVA Fulton plant, taking into account the cost of interest and taxes paid by the private companies" (F. 45, R. 70). Thus, the only concern of the Budget Bureau was that any proposal meet its fiscal standards.

Prior to the time when Wenzell had his first discussion with Hughes about this project in the middle of January, 1954, petitioner had decided that the AEC was to be the contracting agency (F. 45, R. 70). As such, of course, the AEC was to be the one responsible for negotiating any contract, and Wenzell was never an agent, employee or consultant of the AEC. The Findings state:

"The evidence shows that from December 2, 1953 (the date on which Dodge first discussed the proposed project with Strauss), until the Power Contract was signed, the defendant never changed its decision that the AEC was to be the contracting agency for the generating plant" (F. 51, R. 74-75).

Many months later, it was the AEC's "team of negotiators" who began "negotiation of the contract" on July 7, 1954. It was the AEC's "competent and aggressive staff of negotiators" who participated in the "lengthy, arduous, and hotly contested" negotiating sessions lasting from July 7, 1954, to November 11, 1954 (F. 133, R. 120).

2. **Wenzell's activities as a Budget Bureau consultant prior to the submission of the February 25 proposal "related primarily to the cost of money" and, secondarily, to staying in touch with the sponsors as a kind of "expediter."**

Petitioner agrees that "during the period the Government and the sponsors were developing the proposal of

February 25th * * * Wenzell's assignment as a consultant related primarily to the cost of money (F. 74, R. 89)" (Pet. Br., p. 12).*

The Findings set forth Wenzell's duties and activities as a consultant:

"Wenzell was to assist the Bureau again as a part-time consultant during the exploratory discussions on the project, particularly with respect to the probable interest cost of any financing plans that might be discussed. His work was to be in the technical area of comparative costs" (E. 45, R. 70).

Although, as petitioner states, "Wenzell's assignment as a consultant related primarily to the cost of money," during the period prior to submission of the February 25 proposal Wenzell was also requested by Hughes to act as a kind of "expediter" (F. 46, R. 71). Petitioner states that Wenzell "helped formulate" the February 25 proposal (Pet. Br., p. 46). There is no finding and there is nothing in the record to the effect that Wenzell had anything to do with the "formulation" of the February 25 proposal, or any other proposal. It was specifically found that "Wenzell did not participate in the drafting of the proposal" (F. 66, R. 81). Giving an opinion of estimated interest costs and impressing the sponsors with the need for prompt action on the matter, which is petitioner's own summary of Wenzell's activities in connection with the development of the February 25 proposal, certainly do not constitute "formulating" a proposal. At pages 11 and 12 of peti-

* Illustrative of how far the argument in petitioner's brief is removed from its "Statement" is the radically different statement, at page 44 of petitioner's brief, in connection with this period of Wenzell's activities, that "He was a significant Government negotiator * * *."

tioner's brief, Wenzell's activities in this connection are accurately described:

"After learning that Wenzell knew both Dixon and McAfee, Hughes asked Wenzell to attend, on behalf of the Budget Bureau, the meeting scheduled for January 20 * * * and to use such influence as he had with the private utility people to impress upon them the need for prompt action (F. 46, R. 71).
* * *

"Wenzell had been asked by Assistant Director Hughes to stay in touch with Dixon and his associates on the development of a proposal and, particularly, to help point up the real cost of money to be used in financing the project (F. 55, R. 76). He advised both Hughes and the Dixon group on this matter throughout the period of his service (F. 55, R. 76)" (Pet. Br., pp. 11-12).

The Budget Bureau had to determine as quickly as possible whether a proposal could meet its fiscal standards and was sufficiently feasible to justify the Bureau's previous elimination from the budget of the appropriation for the construction of the proposed Fulton plant by the TVA (Fs. 37, 40, 45, R. 64, 67, 70). It was only in connection with this preliminary exploratory phase that Wenzell acted to encourage the sponsors to submit a proposal. This had nothing to do with negotiating, as petitioner tries to imply in its Argument.

The information that Wenzell obtained from First Boston regarding its estimate of the probable cost of debt money, was merely an estimate of what the interest rate would be if the market remained as it then was. The actual rate was to be—and was—determined by negotiations with lenders. "The cost of money * * * is not a static figure, but varies from day to day, and sometimes from hour to hour in accordance with the ups and downs of the market"

(F. 102, R. 104). These facts illuminate the absurdity of the statements throughout petitioner's brief which sound as if Wenzell in some way determined by his own *ipse dixit* the price at which over \$100,000,000 could be borrowed. No banking house has a monopoly upon money market information. They all constantly watch its ups and downs. When asked for probable money rates, they come up with almost identical ones; in this case the various banking houses consulted did give identical information— $3\frac{1}{2}\%$ (Fs. 62, 101, R. 79, 103). This is to be expected. Banking houses make competitive bids for bonds almost daily and their bids differ by very slight amounts.*

* For example, The Wall Street Journal reports recent competitive bidding for debt security issues showing minute variations in annual costs between the high and low bids as follows:

Date of Wall St. Journal (all 1960)	Issue	Number of Bids	Difference in Annual Interest Cost Between High and Low Bid
August 24	Southern California Edison Company, \$60,000,000 of 25 year first and refunding mortgage bonds, non-refundable for first five years.	3	.0154%
August 3	Southwestern Bell Telephone Company, \$100,000,000 of 35 year debentures.	2	.0190%
July 27	Southern Counties Gas Company, \$23,000,000 of 25 year first mortgage bonds, non-refundable during first five years.	5	.0439%
July 13	Central Illinois Electric & Gas Company, \$10,000,000 of 30 year first mortgage bonds.	7	.0684%
July 8	Gulf Power Company, \$5,000,000 of 30 year first mortgage bonds.	4	.0540%
July 7	Illinois Bell Telephone Company, \$50,000,000 of 37 year first mortgage bonds.	3	.0383%

Petitioner states that Wenzell's activities in connection with the February 25 proposal were "decidedly significant—particularly in the inquiry into the leading element of money costs" (Pet. Br., pp. 46-47). It is important to bear in mind that what was under consideration was merely a probable interest rate, binding on no one. As the court found (F. 102, R. 103-04), both respondent and petitioner made it exceedingly clear to each other that the estimate of a cost of $3\frac{1}{2}\%$ for debt money would not be accepted as binding for the purpose of whatever contract might be negotiated, but that the terms of any such contract would have to be based on whatever the actual cost of such money turned out to be. This actual cost turned out to be not $3\frac{1}{2}\%$, but approximately 3.58% (F. 114, R. 112).

There is not the slightest evidence that the February 24th draft of interest rate opinion or the final version of April 14th was ever considered by anyone in connection with the actual financial arrangements, and it is ludicrous to suppose it would have been. The institutional investors were not concerned with First Boston's prediction, some months before, of what the interest rate would probably be; they were concerned with the actual interest rate they could get for their money in the then market.

3. All Wenzell's activities in connection with the February 25 proposal, including those relating to the sponsors and First Boston, were part of his assigned job as a Budget Bureau consultant.

Wenzell's activities in connection with the February 25 proposal—conveying to the sponsors advice regarding the probable cost of money, attending meetings in New York and Washington where the project was being discussed by the sponsors and others, and encouraging the sponsors to get a proposal in and to do it soon—were all

part of the job which Hughes had assigned to Wenzell (Fs. 46, 54, 55, 57, 61, 64, 65, R. 71, 75, 76, 79, 80). The affirmative findings are that two of the sponsors' representatives made the calculations used in the preparation of the proposal and that Wenzell did not participate in its drafting (F. 66, R. 81).

Moreover, it was not merely known to Hughes that Wenzell was to get information from First Boston as to the probable interest cost of the debt securities; it was suggested by Hughes that Wenzell do so (Fs. 59, 60, 67, R. 77, 78, 82). That Wenzell was conveying this information to the sponsors, just as he was conveying it to the Budget Bureau, was also in accordance with Hughes' specific instructions, so that both the sponsors and the Budget Bureau "would be talking about one and the same factor" (F. 66, R. 81).

At page 43 of its brief, in the argument portion, petitioner states that Wenzell "was retained as an expert consultant for the Budget Bureau and acted as such; he himself informed members of the Dixon-Yates staff that he was at their service as a representative of that agency (F. 55, R. 76)." Petitioner tries to create the impression that Wenzell told members of the Dixon-Yates staff that he was at their service as a representative of that agency in a general capacity. The finding was, as is accurately stated by petitioner in the first half of its brief, that Wenzell met with members of Dixon's staff on January 27, 1954, and "told them that he was at their service as a representative of the Budget Bureau on the matter of the cost of money needed to finance the plan" (Pet. Br., p. 15).

As the court below stated: "At the stage of the proceedings during which he [Wenzell] was employed by the Bureau of the Budget, there were no secrets" (R. 13). Or as Judge Bryan said in his concurring opinion, the Government would, with the doctrine denouncing duplicity in

agency, "condemn its own agent for pursuing aboveboard the honest directions of his Government" (R. 31).

4. Wenzell's active participation as a Budget Bureau consultant ended just prior to the time petitioner rejected the February 25 proposal on the basis of analyses by Adams and staffs of the AEC and TVA.

After the February 25 proposal was filed, Wenzell's "function related principally to the total cost of the project (F. 74, R. 89)" (Pet. Br., p. 12), a subject upon which he repeatedly protested his lack of qualification and upon which Adams of the FPC was called in as an advisor by the Bureau on March 19 (Fs. 74, 85, 89, R. 89, 97-98).

As petitioner relates, on March 24, as a result of the analyses of the February 25 proposal by Adams of the FPC and the staffs of the AEC and the TVA, "the sponsors were flatly informed that the cost estimates contained in their proposal were too high to form a basis for serious consideration by the Government (F. 84, 93, R. 94, 99)" (Pet. Br., p. 45).

Petitioner alleges that Wenzell's activities in connection with "the general intra-government analyses of Dixon-Yates' cost estimates" of the February 25 proposal* were "decidedly significant" (Pet. Br., pp. 46-47). Since the February 25 proposal was rejected and found not to be an acceptable basis for the negotiation of a contract (Pet. Br., pp. 14-15, F. 95, R. 100), it is apparent that the only "decidedly significant" effect the activities of Wenzell may have had in connection with the February 25 proposal was the rejection of that proposal. In fact, although Wenzell

* Petitioner does not actually label the proposal which it discusses in this part of its brief as the "February 25" proposal. The reference must be to that proposal, however, because Wenzell did not participate in any general intra-government analyses of cost estimates relating to the April 10 proposal. These were not made until after Wenzell's consultancy had been concluded (Fs. 100, 106, 129, R. 102, 106, 118).

admitted he was not qualified to advise on overall costs, he expressed the opinion to the Bureau "that the estimates of costs in the February 25 proposal were too high" (F. 74, R. 89).

The unanimous Findings show that as early as March 1 Wenzell stated to his superiors in the Budget Bureau that he could not analyze costs as they might be affected by power engineering (F. 74, R. 89). On March 9 he stated to the then Director of the Budget Bureau, Dodge, that "he was not qualified to advise the Bureau on the matter of overall costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission" (Fs. 85, 89, R. 95, 97-98). He reiterated this suggestion on March 15 (F. 89, R. 97-98).

March 16, 1954, really marked the end of Wenzell's active participation as a Budget Bureau consultant (Fs. 92, 94, R. 99). Adams began acting as a technical consultant to the Bureau on March 19, 1954 (F. 91, R. 98-99). On March 22, Hughes, upon returning to Washington from a trip, telephoned Wenzell "to make sure that he (Wenzell) had turned everything over to Adams" (F. 92, R. 99). The next day "Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day." Wenzell had a discussion with Adams and returned to New York the same evening (F. 92, R. 99).

Although thereafter there were a few telephone calls, Wenzell did no further work for the Bureau after this date except to attend two meetings in Washington on April 3 at the request of the Bureau (Fs. 94, 97, 98, R. 99-101).*

* Petitioner's brief (p. 47) says that Wenzell "participated" in the April 3 meeting. The only participation shown (F. 97, R. 100-01) is that he appears once again to have given the same information about probable interest costs. It is significant that with so many cooperative Government witnesses, petitioner was unable to show that Wenzell ever really did anything specific except deliver the First Boston prediction of financial weather and carry messages for Hughes.

"Since Adams had been called in by the Bureau to advise it on the cost of the project, there was very little work for Wenzell to do for the Bureau after March 23, 1954" (F. 94, R. 99).

It was not until after March 23, as petitioner itself recognizes, that:

"The sponsors then began to develop a new proposal which they discussed with the Budget Bureau and the AEC at a series of conferences between April 1 and April 10, 1954 (Fs. 95, 97, 100, 102, R. 100, 102, 103). After modifying the proposal in the light of discussions with the Government's representatives, the sponsors, on April 12, 1954, submitted a formal proposal to the AEC under the date of April 10 (Fs. 103, 107, R. 104, 106)" (Pet. Br., p. 7).

C. Wenzell did nothing as a Bureau consultant with respect to the April 10 proposal except to confirm the information on the probable cost of money.

1. Wenzell's consultancy ended before the sponsors even began to draft the April 10 proposal and his only activities relating thereto were to confirm advice theretofore given on the probable cost of money.

As stated above, after March 16, Wenzell as a Budget Bureau consultant had only a few more telephone calls on the project and made only one more trip to Washington—on April 3—at the request of the Bureau. On that date he "confirmed to Dixon and Yates, as well as to Hughes, the information which he had previously given them on the cost of money" (F. 97, R. 100-01). This was Wenzell's only activity in connection with the April 10 proposal.

The unanimous Findings show that after April 3 Wenzell ceased to serve as a consultant to the Bureau and performed no further services for the petitioner (Fs. 74, 98, 106, R. 89, 101, 106). It was not until three days later, on April 6,

1954, that the sponsors gave to the Government a general outline of the second proposal about which they were then thinking (F. 100, R. 102): Wenzell had nothing to do either with this outline or with the subsequent drafting of the proposal (F. 104, R. 105).

Petitioner states that the "sponsors submitted tentative drafts of their two proposals to the AEC and the Budget Bureau before submitting their formal offers. Wenzell participated in meetings with the AEC and the Budget Bureau at which tentative drafts of the first and second proposals, and the final version of the first proposal, were analyzed and reviewed" (Pet. Br., pp. 13-14). This is not so. As shown above, the sponsors did not even submit a "general outline" of their second proposal until April 6. Not until April 8 did the sponsors present a draft of their second proposal to a meeting attended by AEC and Budget Bureau representatives (F. 100, R. 102-03). Since Wenzell was not in Washington after April 3 (F. 98, R. 101), he could not have participated in meetings with the AEC and the Budget Bureau at which a tentative draft of the second proposal was analyzed.

Wenzell did not participate in any of the meetings where the basic cost estimates for the April 10 proposal were prepared (F. 95, R. 100); nor did he participate in the drafting of that proposal (F. 104, R. 105). His only function after April 3, 1954, and before the proposal was submitted to the petitioner, when he was of course no longer a Budget Bureau consultant, had to do with obtaining the judgment of First Boston on the current probable cost of the required debt money (F. 104, R. 105-06). The ultimate and different money costs which were the basis of figures in the contract were not agreed to by petitioner until, during the negotiation of the contract itself, respondent had obtained commit-

ments from purchasers of the debt securities and the cost of the debt money had been thereby removed from the uncertain realm of opinion—that of First Boston, Wenzell or anyone else—to the realm of actuality (Fs. 102, 114, R. 103-04, 111-12).

2. It was the April 10 proposal which later served as the basis for beginning negotiation of the contract—not the rejected February 25 proposal.

On June 30, 1954, three months after Wenzell's connection with the Government had ended, the AEC notified the sponsors that their proposal dated April 10, 1954, "constitutes a satisfactory basis for negotiation of a definitive contract. We are ready to begin negotiations" (F. 131, R. 119-20; see also Pet. Br., pp. 7, 8). Negotiations commenced July 7, 1954 (F. 133, R. 120).

Thus Wenzell's activities as a Bureau consultant related almost exclusively to a proposal which wound up in the wastebasket four months before the negotiation of the contract began. The proposal of April 10, the proposal with which Wenzell had nothing to do but confirm estimates previously given as to the probable cost of money, served as the basis for negotiating the contract.

There simply is no support in the Findings or in the record for petitioner's assertions that the second proposal "rested firmly upon the negotiations and analyses of the unsatisfactory first proposal" (Pet. Br., p. 47). On the contrary, the affirmative finding is (F. 104, R. 105):

"The sponsors' proposal of April 10, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith, and Seal [all representatives of sponsors]. Wenzell was not present in Washington at any of the sponsors' meetings during which the proposal was drafted."

Moreover, the April 10 proposal was basically and significantly a different type of proposal, all the information for which was developed by representatives of the sponsors (Fs. 93, 103, R. 99, 104). Whereas the first proposal, which was prepared under pressure, had been based upon adaptations of other studies, including comparisons with TVA estimated costs for its Fulton plant,* the new proposal was based upon new basic estimates. It is true that a Government representative made the request that such new basic estimates for the cost of constructing a plant and other facilities should be prepared, but Adams of the Federal Power Commission was that representative (F. 93, R. 99). These new basic estimates were prepared by representatives of the sponsors, together with an independent engineering firm, and "were used as a basis for the sponsors' proposal of April 10, 1954" (F. 95, R. 100).

By combining and confusing the findings with respect to the two proposals, petitioner creates the erroneous impression that Wenzell was an active consultant on the proposal which constituted the basis for negotiation of the contract. For example, petitioner states:

"It follows that Wenzell's absence from the negotiation of the formal contract, after the proposal in which he participated was accepted as the basis for further negotiation, did not take him out of the statute's reach. As we have indicated, the statute's broad terms apply during the preparatory negotia-

* The fact that the February 25 proposal was based in part upon comparisons with TVA estimated costs was frankly and openly stated in that proposal (F. 103, R. 104). There is no other reason why the sponsors, along with representatives of the Budget Bureau, looked at certain financial data regarding TVA which was not available to the general public; and the reference to this on page 13 of petitioner's brief is pure red herring, having nothing to do with the conflict-of-interest issue.

tions which normally mold the final contract" (Pet. Br., p. 48).

Such ambiguity and confusion avoid the significance of the facts. Wenzell's activities as a Bureau consultant related almost exclusively to the February 25 proposal, which was rejected. His only activity in connection with the April 10 proposal was to confirm estimates of the probable cost of money—estimates which both parties had disavowed as controlling if a contract should be negotiated. And, it was the April 10 proposal—not the February 25 proposal—which was the starting point for negotiating the contract (F. 131, R. 119-20).

The absence of any causal relationship between what Wenzell did and the contract is even more apparent in light of the finding that "The Power Contract resulted from the following:" (a) submission to the AEC of the April 10 proposal; (b) the advice from the AEC on June 30 that the proposal constituted a satisfactory basis for the negotiation of a definitive contract and that the AEC was ready to begin negotiations; and (c) the commencement of negotiations on July 7, which terminated with the signing of the power contract on November 11, 1954 (F. 3, R. 49-50).

Petitioner's brief is misleading in its references to the proposals made by the sponsors as if they were offers the acceptance of which would result in a contract. For example, the heading on page 5 refers to a "firm" proposal. On page 28 there is a reference to "a proposal which would furnish an acceptable basis for a contract." The same phrase appears again on page 44. On page 47 this deception has grown into the "accepted proposal."

Neither proposal was an "offer" in the sense in which that term appears in "offer and acceptance" as used in contract law. As is demonstrated by what actually hap-

pened, the April-10 proposal was never regarded as anything but a basis or starting point for the negotiation of a contract.

- D. Wenzell's activities as a Budget Bureau consultant are both *de minimis* and irrelevant and immaterial, because he did nothing of any significance in connection with the contract upon which suit was brought and judgment entered.

Whatever influence Wenzell had as a Budget Bureau consultant—and there is no finding that it was significant—related only to the February 25 proposal. It is clear from the Findings that he had nothing whatever to do with the reviews and analyses of the April 10 proposal, the decision to begin the negotiation of the contract, the negotiation of the contract, or the extensive reviews and analyses of the contract before it was finally executed (Fs. 129-136, R. 118-22). Petitioner contends that these facts should not make 18 U. S. C. 434 inapplicable because “interested Government representatives could exert *significant influence* over the transaction in which they were participating, and yet escape responsibility under the statute by resigning before the final contract was signed” (Pet. Br., p. 29).

Wenzell, however, did not assert *any* influence, let alone any *significant influence*, over the transaction in suit here, i.e., the contract. This fact alone makes the statute inapplicable in this case even under petitioner's conception of the statute.

Wenzell's activities in connection with the February 25 proposal are in their proper perspective when their unimportance initially is realized and when, in addition, they are filtered through (1) the rejection by petitioner of the February 25 proposal and the independent formulation

by the sponsors of the essentially different April 10 proposal; (2) the independent review of the latter proposal by representatives of TVA and AEC and Adams of the FPC, and the independent comparison of such proposal and that received from the Von Tresckow group; (3) the three months which elapsed between the end of Wenzell's activities and the Government's independent decision to begin negotiating a contract; (4) the more than seven months which elapsed between the end of his activities and the execution of a contract; (5) "the lengthy, arduous and hotly contested" negotiations of the contract by "a competent and aggressive staff of negotiators" representing the Government,* and (6) the direct and decisive action regarding the contract taken by the President,** the Commissioners of the AEC and other high officials of that Commission, the Attorney General and the Department of Justice generally,† the Federal Power Commission,†† the TVA,‡ the Comptroller General's Office,‡‡ the SEC and its Staff,§ the General Counsel of the AEC,§§ and the Joint Committee on Atomic

¶ Fs. 129, 130, R. 118-19.

* F. 133, R. 120-21.

** Fs. 22, 130, 152(b), R. 56-57, 119, 141.

† Fs. 150, 152(b) and (e), 173(c), 203(c), R. 138, 141-43, 158-60, 190.

†† Fs. 85, 92, 93, 94, 95, 96, 97, 100, 102, 135, R. 95, 99-100, 102, 103, 122.

‡ Fs. 38, 84, 89, 129, 135, 149, 154, R. 66, 94, 97, 118-19, 122, 137-38.

‡‡ Fs. 152(a), (c) and (d), 173(e), 203(b), R. 140-42, 161, 190.

§ Fs. 152(f), 173, R. 143, 157, *Matter of Mississippi Valley Generating Company*, 36 S. E. C. 159 (1955).

§§ Fs. 152(g), 173(d), 203(a), R. 143, 160, 187-90.

Energy of the Congress.* Indeed Congress itself enacted Section 154 of the Atomic Energy Act of 1954 primarily for the purpose of authorizing this contract.**

In this connection, petitioner's brief is marked by a sly and deceptive use of the adjectives "formal," "firm," "final" and "express" relative to the contract, to give the impression that there were two contracts here: one an informal contract and the other the formal, written contract. For example, "formal" appears before "contract" in petitioner's brief on pages 8, 9, 25, 28 (three times), 29 (twice), 34, 35 (twice), 46 (twice) and 48. On page 50 this word is even interpolated into a quotation from Judge Madden's opinion. There is a "firm" contract spoken of on page 9 and an "express" contract on page 31. There is a "final" contract on pages 7, 29 (twice), 46, 47, 48 and 52 (ftn.).

There was no contract, understanding or other arrangement, legally or morally binding upon either party, formal, informal, express, implied or otherwise, until the signatures were put to the printed document on November 11, 1954. As late as November 10, 1954, the day before the contract was signed, "it was doubtful whether there would be a contract" (F. 133, R. 120-21).† There is nothing in the Findings to the contrary.

* Fs. 134, 167, 168, 169, 170, 171, R. 121, 155-56.

** *Legislative History of the Atomic Energy Act of 1954* (Public Law 703, 83d Cong.), U. S. Atomic Energy Commission, Vols. I, II and III (Washington, 1956); see e.g., Vol. III, p. 3250 et seq.

† The reference to November 19 in the record is an obvious misprint and should be November 10. See Appendix to Petition for Writ of Certiorari herein, p. 158.

1. **Petitioner did not even decide to commence contract negotiations until approximately two and one-half months after Wenzell's Bureau consultancy ended and only after petitioner made an intensive review of the April 10 proposal and of a competing proposal submitted by the Von Tresckow group.**

After Wenzell left the Government on April 3, 1954, an intensive review and analysis of the April 10 proposal was made by TVA and AEC, with Adams of the Federal Power Commission participating for the Budget Bureau (F. 129, R. 118-119). A competing proposal was made by a group headed by Von Tresckow on May 27, 1954. This was analyzed on a comparative basis with the April 10 proposal and with the estimated TVA costs for the Fulton plant (Fs. 129, 130, R. 118, 119).

It was not until June 16, 1954, two and one-half months after Wenzell left the Government, that a decision was made by the President to instruct the AEC to commence negotiations with the respondent on the basis of the April 10 proposal of the sponsors. "Until these instructions were received, no decision had been made by AEC to enter into negotiations with the sponsors" (F. 130, R. 119).*

The sponsors did not know of this decision until June 30, 1954 (F. 131, R. 119-120). The AEC's notification to the sponsors of its willingness to begin negotiations "was not an acceptance; it was simply a statement that AEC

* Compare the reference in petitioner's brief (p. 4) to "closed negotiations with a selected business entity." This is either irrelevant or false. If it refers to a selection and closed sessions after Wenzell left the Government, it is irrelevant. If it refers to the time prior to his leaving the Government, it is false, as the draftsman of the brief knew. For he showed by his statement on page 8 regarding the Von Tresckow proposal that nothing was closed and nothing was decided until June 16, long after Wenzell had left.

was ready to begin contract negotiations" (F. 131, R. 119-120).

There is no dispute that Wenzell, having previously left the Bureau, had nothing whatever to do with any of these analyses, reviews, and deliberations, or with the President's decision.

2. Wenzell had nothing to do with the "lengthy, arduous and hotly contested" negotiations between the AEC and respondent beginning on July 7, 1954, and concluding on November 11, 1954—over seven months after Wenzell's Budget Bureau consultancy terminated.

As has been shown, Wenzell's only function regarding the April 10 proposal was to confirm the First Boston opinion as to the estimated interest rate for debt money. But, even if Wenzell did have this slight contact with the April 10 proposal, he had no contact whatever with the contract itself, and the contract was a document far different from the proposal.

The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954. The negotiating sessions were "lengthy, arduous and hotly contested." There were 15 formal sessions for which minutes were kept and additional informal sessions (F. 133, R. 120).

Petitioner was represented by an AEC team of negotiators with a total of 14 different people taking part in this team. "They were a competent and aggressive staff of negotiators" (F. 133, R. 120).

Nine successive proofs of the proposed contract were printed to incorporate revisions developed in the negotiations. The contract, with related appendices and an interpretative memorandum, was worked out word by word to the extent of 69 printed pages. This contrasts sharply

with the April 10 proposal of only nine typewritten pages (Fs. 133, 134, R. 120-21).

The General Manager of the AEC reported to the Joint Committee on Atomic Energy of the Congress that the contract contained 25 provisions which were improvements over the terms of the April 10 proposal from the standpoint of the AEC, and that the contract contained a number of other items which were major concessions to the petitioner (F. 134, R. 121).

During this period, the AEC furnished proofs of the proposed contract from time to time to the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. Joint meetings were held between the AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times, the Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Proofs of the contract were likewise made available to TVA, and after meetings between representatives of the AEC and TVA, a number of the TVA suggestions were incorporated verbatim in the contract (F. 135, R. 122).

Despite all these extensive negotiations and consultations, as late as November 10, 1954, the Government insisted on two new major contract provisions, and it was doubtful whether there would have been a contract unless the sponsors' representatives had agreed to these requests (F. 133, R. 120-21).*

The contract grew out of these negotiating sessions—and only out of them—and the finding is specific that Wenzell did not participate in them.

Despite its statement that "even a person merely in an advisory position is affected by the rule". (Pet. Br., p. 50), petitioner obviously realizes it must somehow make

* See footnote †, *supra*, p. 28.

Wenzell a "negotiator" to bring him within the scope of § 434. Otherwise, why would petitioner find it necessary to use the words "negotiator," "negotiations" and "negotiating" at least 20 times in its attempt to establish that Wenzell somehow acted "as an officer or agent of the United States for the transaction of business with respondent's organizers" (Pet. Br., pp. 42-50). But the finding is:

"Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation" (F. 136, R. 122).

"3. The "Power Contract was negotiated, executed, and has been administered with an extraordinary measure of disclosure to the Congress and the public."*

The proposed contract was the subject of extensive debates, Committee Reports, and resolutions in both Houses of Congress prior to its execution. As stated above, a section was included in the Atomic Energy Act of 1954 specifically to authorize this very contract (See Fs. 148, 152, R. 137, 140-143). Prior to its execution the proposed contract was the subject of Congressional hearings.**

* "Brief for the United States as *Amicus Curiae*" filed with the Court of Appeals for the District of Columbia on the appeal from the SEC order approving respondent's equity financing for the performance of this contract. See references thereto in Fs. 152(e), 173(e), and 203(e), R. 142-143, 158-160, 190. This brief was signed by the Assistant Attorney General of the United States, and by three attorneys of the Department of Justice. Of counsel were the General Counsel of the AEC and another attorney for the AEC.

** *E. g.*, Hearings before the Joint Committee on Atomic Energy on S. 3323 and H. R. 8862, 83d Cong., 2d Sess., Part II, at 945-1122 (1954); Hearings before a Subcommittee of the Committee on the Judiciary, *Power-Policy, Dixon-Yates Contract*, 83d Cong., 2d Sess., Part I, 1-183 (1954); and Hearings before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess., *Exercise of Statutory Requirements under Section 164, Atomic Energy Act of 1954*.

Furthermore, the April 10 proposal itself was printed in the Congressional Record on July 14, 1954. Various proofs of the contract and the contract itself were reviewed by a Congressional Committee prior to its effectiveness. For example, on August 18, 1954, Nichols, General Manager of the AEC, sent the Chairman of the Joint Committee on Atomic Energy of the Congress a copy of the sixth proof of the contract dated August 11, 1954 (F. 167, R. 155). On November 11, 1954, the AEC sent the Joint Committee an executed copy of the contract and its supplements, the interpretive memorandum, the letter contract between the sponsors and AEC, a copy of the opinion of the General Counsel of AEC, and two letters from respondent regarding the execution and delivery of the contract (F. 170, R. 156); and thereafter the contract became effective because of affirmative action by the Joint Committee (Fs. 165-173; R. 154-61).

On October 6, 1954, the Acting Chairman of the AEC wrote the Chairman of the Joint Committee regarding the October 1 proof of the proposed contract. The writer reported that before the draft was approved, the AEC had favorable letters from the Federal Power Commission, the General Accounting Office, TVA, the Bureau of the Budget, the Chief of Engineers, and an opinion from the General Counsel of the AEC (F. 168, R. 155).

Furthermore, the Acting Comptroller General submitted opinions to the AEC on October 5 and December 13 to the effect that the AEC had the authority and power to execute the contract and perform the obligations thereby imposed upon it pursuant to the provisions of the contract (Fs. 6, 7(c), 152[a], 152[c], R. 50-51, 140-141, 142). By authorization of the President, the Attorney General of the United States furnished Chairman Strauss of the AEC an opinion on October 20, 1954, respecting the validity of the proposed power contract (F. 152[b], R. 141). On October 12, 1954, the Acting Comptroller General advised the Chairman of

the Joint Committee on Atomic Energy that the execution of the proposed contract was authorized by Section 164 of the Atomic Energy Act of 1954, and that the contract complied with all statutory requirements applicable to its execution by AEC (F. 152[d], R. 142). On November 11, 1954 the General Counsel of the AEC delivered to respondent an opinion to the effect that the AEC had the power and authority to execute the contract and the undertakings therein described and to obligate the United States for all payments which may be required to be made by the AEC to respondent pursuant to any of the provisions thereof (Fs. 6, 7[s], R. 50-51).

E. First Boston was retained as one of MVG's financial agents only after Wenzell's Budget Bureau consultancy ended, and there was no agreement or understanding relating to such retainer prior to that time.

- 1. During the period of Wenzell's Government consultancy there was no understanding or agreement of any kind regarding the retention of First Boston as MVG's financial agent.**

Petitioner's brief (p. 56) says that, prior to Wenzell's leaving the Government, First Boston did not have an "out-right commitment" regarding the financing.

The court below said:

"There is not a shadow of evidence that [during the time Wenzell was a Budget Bureau consultant] it [First Boston] had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of

the corporation which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding" (R. 20).

That the sponsors did not even feel they were somehow under an unexpressed but honorary commitment to First Boston is evident from the fact that, when the time came in May to make arrangements for the financing of the hoped-for project,

"Dixon felt perfectly free to place 40 percent of the financing business with Lehman Brothers, and would, apparently, have felt perfectly free to place all of it elsewhere than with First Boston, if he had so desired" (R. 15; see also R. 16, 20).

2. **First Boston was retained "for good business reasons" as one of MVG's financial agents, after Wenzell's Budget Bureau consultancy ended.**

As shown above (*supra*, pp. 20-21), the active period of Wenzell's consultancy ended in the middle of March 1954 (Fs. 92, 94, R. 99-100). Thereafter, his Budget Bureau activities were confined to confirmations of estimates of money costs previously conveyed, to turning matters over to Adams, who began acting as a technical consultant to the Budget Bureau on March 19 (Fs. 91, 92, R. 98-99), and to a few final and desultory contacts, ending with his attendance at two meetings in Washington on April 3, 1954, at the request of the Budget Bureau (Fs. 94, 97-98, R. 99-101). It was unanimously found that Wenzell ceased to serve as a consultant to the Budget Bureau on April 3 (Fs. 55, 74, 106, R. 76, 89, 106).

First Boston was not retained as one of MVG's financial agents until almost two months after Wenzell's active period as a Budget Bureau consultant ended (March 16 to

May 12), and over one month after he ceased to serve as a consultant (April 3 to May 12).

Specifically, the findings are that as of May 7, 1954, Woods of First Boston "planned to use several of First Boston's officers as a small task force to prepare the memorandum [in which First Boston was to present to respondent its idea of an appropriate financing program] and to approach the banks and insurance companies in the event First Boston was retained to perform the service" (F. 112, R. 110-11). "Dixon introduced the idea at the meeting [of May 7, 1954] that if First Boston was to arrange for the financing he would like to have Lehman Brothers associated with First Boston in the undertaking" (F. 112, R. 110-11). "However, the consummation of an agreement between the sponsors and First Boston was delayed when Dixon stated on May 7 that he would like to have Lehman Brothers associated with First Boston on the task of raising the money" (F. 116, R. 113). "On May 19, 1954, Woods issued to certain First Boston personnel a memorandum setting forth the agreement he had concluded with Dixon on or about May 12, 1954, regarding First Boston's association with Lehman Brothers in the financing arrangements" (F. 115, R. 112-113). "There never was any written agreement of retainer, but the evidence shows that all questions were resolved by May 12, 1954, when Dixon and Woods agreed that First Boston and Lehman Brothers would act as financial agents for the sponsors" (F. 116, R. 113).

First Boston was retained as one of MVG's financial agents "for good business reasons" (R. 17-18) which were independent of Wenzell.

The court below found:

"TVA is a very large supplier of electrical energy to the AEC. However, the AEC also purchases huge

amounts of energy from private suppliers. One of these suppliers is the Ohio Valley Electric Corporation (hereinafter designated as OVEC), composed of a group of private utilities which, in 1952, contracted with AEC to supply it with 1,800,000 kw. at Portsmouth, Ohio. This is one of the largest generating plants in the world, and a large amount of financing was required by the utilities that banded together to carry out this undertaking.

"First Boston was employed by OVEC to arrange for this financing, consisting of directly placing the securities of OVEC with large institutional investors" (F. 27, R. 59).

The reason for hiring First Boston was expressed as follows by respondent's counsel:

"James felt that if it became necessary to finance the project, First Boston would receive first consideration as financial agent because of its experience on the OVEC project" (F. 68, R. 84).

As the court pointed out:

"There was, of course, a substantial possibility that if the Administration's hope that private capital would build the necessary plant should be realized, First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such enterprises, might be employed by the company which got the contract" (R. 14).

By constant repetition, petitioner attempts to give substance to its assertion that "it was Wenzell's own conduct which, in large part, made it so likely that First Boston would become the financial agent on the project" (Pet. Br., p. 57), rather than the fact of "First Boston's experience in arranging for the financing of the project for the Ohio Valley Electric Corporation" (dissenting opinion of Chief Judge Jones, R. 45). Similar assertions of peti-

tioner appear at pages 29, 51-52 and 59 of its brief. There is no support for these assertions.

Because there is no such support, petitioner resorts to distortions of the opinion of the court below and of the Findings. For example, petitioner states:

"Wenzell's activities continually kept his company to the forefront of the negotiations so that by the 'logic of circumstances' (R. 16) it stood to receive the financial agency for the project and was, in fact, retained for this purpose long before the formal contract between the United States and respondent was negotiated" (Pet. Br., p. 29).

This is a misuse of a phrase from the majority opinion. The "logic of circumstances" to which the majority referred was First Boston's experience in arranging the financing of OVEC and not Wenzell's activities as a Bureau consultant (See R. 5, 12, 14, 17).

The support of petitioner's theory regarding Wenzell's conduct is itemized on pages 57-59 of its brief. An examination of each of the findings cited in these pages demonstrates that Wenzell engaged in the activities described by petitioner for a variety of reasons, none of which was to keep First Boston "to the forefront" in order to "advance [the] likelihood" that it would be retained as a financial agent in connection with the project. For example, petitioner recites that Wenzell brought Miller* to a meeting at the Budget Bureau on January 20, 1954, discussed the project at various times with Miller and obtained financial information from his firm as "a personal favor" for Dixon, and then petitioner baldly states: "It is not surprising therefore that by the latter part of the month Dixon and

PETITIONER

* Respondent inflates Miller's importance by calling him "a First Boston officer" (Pet. Br., p. 11) and "a First Boston vice-president" (Pet. Br., pp. 57-58). He was neither. He was "an assistant in First Boston's buying department" (T. 49, R. 72).

his counsel were talking in terms of giving First Boston first consideration as financial agent (F. 68, R. 84)" (Pet. Br., pp. 57-58). Yet, petitioner itself, in the first section of its brief, correctly states the unanimous finding relating to this particular conversation. Petitioner there states that Dixon and his counsel were discussing the fact "that, if it became necessary to finance the project, First Boston would receive first consideration for the financial agency because of its experience in the financing of the Ohio Valley Electric Company" (Pet. Br., p. 18).

F. Wenzell performed his duties as a Budget Bureau consultant faithfully, diligently and honestly.

It is of course conceded that Wenzell was not an officer, agent, member, employee or stockholder of respondent or its sponsors. Nor did he have any other legal relationship with the sponsors or MVG during the time he was a Government consultant. As shown above (*supra*, pp. 34-35), there was no agreement or understanding of any kind relating to the retention of First Boston as a financial agent during the time Wenzell was a Budget Bureau consultant.

It can be argued that Wenzell may have had some kind of a fugitive hope, but that is the extent of any valid argument based upon the facts before the Court. At best Wenzell might possibly have hoped that at some time in the future the President might determine to have the AEC commence negotiations with respondent; that after "a long period of negotiations" and "many preliminary approvals" (F. 85, R. 95) a contract might ultimately be signed; that, although Wenzell would have no interest in that contract, the contract would involve collateral financing for which a financial agent might be retained; and that First Boston, of which Wenzell was an officer, might be selected as that financial agent to negotiate the financing, not with the Government, but with private institutional investors.

It is undisputed that no improper motive influenced any action of Wenzell as a Government consultant and that in this capacity he exercised absolute loyalty and undivided allegiance to the best interests of the Government. As the Court below stated, Wenzell "served the Administration faithfully in the tasks assigned to him"; he "did what he was assigned to do, did nothing for the Dixon-Yates interest and received nothing from it" (R. 13, 14). Chief Judge Jones recognized in his dissenting opinion "the diligence with which Wenzell pursued his duties in the Budget Bureau" (R. 46; see also, opinion of Justice Reed at R. 32 and Pet. Br., pp. 29, 30, 59-60).

Petitioner repeatedly states that there was no need for it to show or prove actual corruption, fraud, dishonesty or loss to the Government in order to invalidate the contract. Indeed, it devotes an entire section of its brief to this topic (Pet. Br., pp. 71-74). Respondent concedes there is authority for this proposition. However, it is simply not relevant or material to this case. Petitioner conceded in the court below, not merely that it had failed to prove corruption, fraud, dishonesty or loss to the Government, but that there was in fact no corruption, fraud, dishonesty or loss to the Government in this case.

Petitioner's hypotheticals (*e. g.*, Pet. Br., pp. 51-52, 56, 60) and unjustified inferences as to the behavior of a public servant (*e. g.*, Pet. Br., pp. 29, 51-52, 57-59) are clearly unwarranted. Not only do they lack support in the record, but they are also inconsistent with petitioner's admission, as stated by Judge Bryan: "admittedly every act now pleaded to impugn the contract, as the opinion of the court also, well recounts, was 'begun, continued and ended' in good faith and in the full knowledge of the Government. In truth there was no imposture" (R. 31).

Petitioner's position is well summarized by the court below:

"The Government urges, in effect, that the doctrine which it calls to its defense is a prophylactic generalization which must be applied in cases of honest transactions in order to keep it available and effective in cases of dishonest transactions" (R. 21).

Also, in considering whatever hope Wenzell may have had as a possible conflicting interest, one must bear in mind that as events turned out First Boston did not take a fee. Promptly after it was retained two of its principal executive officers determined that there should be no fee (F. 117, R. 113, Pet. Br., p. 24). First Boston, therefore, had no pecuniary interest in the transaction and it would be impossible for Wenzell to have an indirect pecuniary interest through First Boston. The statement in petitioner's brief (p. 59, fn. 17), that the matter was not finally settled until after Wenzell's activities had become a public issue, is not supported by the Findings. So far as First Boston is concerned, it is clear that this determination was made in May or June of 1954 and adhered to by that firm throughout (F. 117-121, R. 113-16). To say that the kudos of handling such a matter gave First Boston a pecuniary interest is absurd (Pet. Br., p. 24). No one could ever do a good job for the Government on that basis. Even a Government lawyer who tried a well publicized case would be deemed to have a personal pecuniary interest because he might subsequently go into private practice and get clients as a result.

SUMMARY OF ARGUMENT

This is essentially a fact case. It is, therefore, important that the facts, as found, be correctly stated and understood in order to apply to them the applicable law.

The decision of the court below should be affirmed because—

1. That decision, on the facts as found, establishes a strict and demanding precedent requiring high standards of integrity and fidelity in the federal contracting process. It commands absolute good faith and honesty, complete disclosure, and prompt and effective action on the part of all persons, in and out of the Government, to prevent the development of any conflict which might conceivably harm the Government in its dealings with private contractors. It protects the sanctity of honest Government contracts.

2. Wenzell, who is alleged by petitioner to have occupied a dual position, was not "an officer or agent of the United States for the transaction of business" within the meaning of 18 U. S. C. 434. He was an unpaid part-time consultant, principally on probable money costs, without authority to act for the United States or bind it in any way; nor did he attempt to do so. Petitioner failed to show that he attempted to indulge in any such negotiating activities, even though petitioner had available as witnesses all the numerous Government personnel who had anything to do with the proposals and the contract. He resigned all Government connections before the decision to negotiate was made by the Government and before negotiations started.

3. Wenzell was not "directly or indirectly interested" in the contract during the time he was a Budget Bureau

consultant. At most, he could have had a mere hope that if in the future, after many contingencies, negotiations should commence and the negotiating parties should reach an agreement, respondent might utilize a financial agent and, because of the leadership of First Boston in the type of financing involved, might retain that firm. The cases and other authorities show that such a hope does not constitute an "interest." Petitioner fails to distinguish between indirect interests on the one hand and remote interests on the other. By any standards, the possibility that Wenzell may have hoped that, way down the line in the future, there might be some business for First Boston, was too remote from the contract to constitute an interest. Moreover First Boston served without compensation and Wenzell could not, therefore, have any indirect pecuniary interest.

4. The issue here is not only whether Wenzell was guilty of violating 18 U. S. C. 434. The petitioner must also establish that, on the facts as found, public policy requires that this Court declare a concededly fair and honest contract unenforceable, not as against Wenzell or anyone claiming through him, but as against respondent. Congress deliberately omitted a sanction of unenforceability from 18 U. S. C. 434, and the cases show that this Court will not legislate by adding such a sanction. It will not declare contracts invalid for reasons of public policy unless (i) the alleged illegality is so inherent in the contract that it cannot be enforced without making the Court a party to the violation of law, (ii) enforcement would aid the wrongdoer in profiting from his own wrong, or (iii) a Government contracting officer purports to enter into a contract which he is forbidden by law to make. None of these elements is here present. The six cases under 18 U. S. C. 434 show

clearly that public policy requires enforcement in favor of respondent of its contract with the Government.

The standards of conduct for Government employees with incipient conflicts which have been prescribed by the Attorney General and other federal officials and agencies, require the doing of what was done in this case: Wenzell was removed from his Government consultancy before any conflict could arise. This was done as the direct consequence of action by respondent.

5. It was basic Administration policy that the Government should attempt to save over \$100,000,000 in federal expenditures by securing the construction of a substitute for the TVA Fulton plant by some non-federal body. That objective was achieved as a direct result of the performance by respondent under the instant contract. Having enjoyed the benefit of that performance, petitioner can not now be permitted to avoid payment of its cost.

ARGUMENT.

I.

The decision of the court below, on the facts as found, establishes a demanding precedent within the letter and spirit of 18 U. S. C. 434, requiring the highest standards of integrity and fidelity in the federal contracting process.

Petitioner's entire case is bottomed on what the late Justice Holmes aptly referred to as the "parade of imaginary horrors"—the horrendous consequences which might follow if the decision of the court below is not reversed. Petitioner would have this Court believe that enforcement of the contract in this case will undermine

the universally recognized principle that "the federal contracting process demands the highest standards of integrity and fidelity," and "in a larger sense, weaken the moral standards of the Nation at large" (Pet. Br., pp. 33, 83). Upholding the decision below will somehow lower "the level of wholesomeness in Government procurement" and presumably impede its rise "toward the unattained ideals of integrity our society has set for itself" (Pet. Br., p. 82).

On a more mundane and specific level, petitioner predicts that contractors, and Government officials will no longer "guard against conflicts-of-interest." Instead, there will be "acquiescence in conflicts" (Pet. Br., p. 33) and "contravention of the Congressional mandate in 18 U. S. C. 434 by complacent, ignorant or negligent officials, as well as by conniving or negligent double-agents" (Pet. Br., p. 80). Contractors will only "give lip service to the public policy against conflicts-of-interests" and will not even express a "faint objection" to conflicts of interest (Pet. Br., p. 81). Government representatives will be "encouraged to rely upon a makeshift morality which winks at violations of law as trivial" (Pet. Br., p. 83).

Such hyperbole might be warranted if this were a case in which this Court was being asked to enforce a contract involving the same "baneful tendencies" present in some of the cases cited by petitioner, such as those involving bribery, including two cases setting aside the infamous Teapot Dome leases which were obtained by direct bribery of the Secretary of Interior of the United States,* and agreements for contingent fees for obtaining contracts with the Government.** In the context of the facts of this case, it is wholly unjustified.

* *Pan American Co. v. United States*, 273 U. S. 456; *Mammoth Oil Co. v. United States*, 275 U. S. 13; *Cf. Crocker v. United States*, 240 U. S. 74; *United States v. Carter*, 217 U. S. 286; *The Michigan Steel Box Co. v. United States*, 49 Ct. Cl. 421 (1914).

** *Hazelton v. Sheckells*, 202 U. S. 71; *Tool Co. v. Norris*, 69 U. S. (2 Wall.) 45.

While giving effect to the policy enunciated by this Court in *Muschany v. United States, infra*, that "it is a matter of public importance that good faith contracts of the United States should not be lightly invalidated," the decision of the court below, on the facts as found, establishes a strict and demanding precedent, within the letter and spirit* of 18 U. S. C. 434, requiring the highest standards of integrity. It commands absolute good faith and honesty, complete disclosure, and prompt and effective action on the part of all persons, in and out of Government, to prevent the possibility of any conflict which might conceivably harm the Government in its dealings with private contractors.

In order for any Government contractor to recover in some future suit against the United States on the basis of this case as a precedent, the record will have to meet the following tests:

1. There must not have been a shadow of evidence of any agreement, understanding or commitment, written or oral, formal or informal, contingent or otherwise, during the period of a person's employment as a Government consultant that the consultant's private employer would be retained as a subcontractor of a potential Government contractor.
2. The Government consultant must have served the Government faithfully and diligently in the tasks assigned to him, done nothing for the potential Government contractor apart from what his Government superior told him to do, and received nothing from such potential contractor.

* Petitioner insists upon what it believes is the letter of §434 and cites the New Testament (Matthew, vi, 24) (Pet. Br., p. 35). However, petitioner has turned its back upon the admonition by St. Paul regarding the New Testament:

"not of the letter, but of the spirit: for the letter killeth, but the spirit giveth life" (II Corinthians, iii, 6).

3. The Government consultant must not have been influenced in any of his actions by any improper motive.

4. There must have been full disclosure by the Government consultant and the potential Government contractor to the Government agency hiring the consultant of any possibility or likelihood that the Government consultant's private employer might be considered as a possible subcontractor of the potential Government contractor.

5. If there was any likelihood that the Government consultant's private employer might become a subcontractor of the potential Government contractor, the Government consultant must have finished his work promptly and turned it over to a qualified Government employee.

6. If there was a possibility that the Government consultant's private employer might be retained as a subcontractor by the potential Government contractor, his consultancy must have ceased prior to the decision of the Government to begin negotiations with the potential Government contractor and prior to completion of the negotiations by agreement upon the terms of the contract.

7. The Government contract itself must be an honest one, arrived at after hard and skillful bargaining by different and independent representatives of the Government.

8. The Government consultant must not have participated in any of the negotiating sessions or consulted with or advised any representatives of the private contractor or the Government during the period of negotiation.

9. Before the Government contract was executed and became effective, it must have been reviewed by all the governmental agencies having any interest in the matter or expertise to contribute.

10. The Government contract must have been the subject of extensive investigation by Congressional committees and debate in Congress, and its execution must have been authorized thereafter by legislation adopted for such purpose by Congress.

11. All transactions relating to the contract must have been honest. There must have been, in fact, no corruption, fraud, dishonesty, imposture or loss to the Government.

If all Government officials and contractors are guided in their relations with the Government by the rules of conduct approved by the holding of the court below, on the facts in this case, there will not be a "shadow of a doubt as to the integrity of Government contracts" (Pet. Br., p. 30) or the slightest "likelihood of disadvantage to the Government." *Muschany v. United States*, 324 U. S. 49, 66.

II.

Wenzell was not "an officer or agent of the United States for the transaction of business" in connection with the contract within the meaning of 18 U. S. C. 434.

That Wenzell was not an "officer" of the Government is clear. He took no oath of office; he had no tenure; he served without salary, except for \$10 per day in lieu of subsistence; his duties were merely consultative, were occasional and temporary and were not prescribed by statute; and he was permitted to continue in his position as one of the vice presidents and directors of First Boston and to draw his salary from that company. That such a person cannot be an "officer" of the Government is well established.

United States v. Hartwell, 70 U. S. 385;

Metcalf & Eddy v. Mitchell, 269 U. S. 514.

That he was not employed as an "agent of the United States for the transaction of business" is equally clear. It is elementary that an agent is one who is authorized to act for another in the contractual dealings of the latter with third persons. Mechem, *Outlines of the Law of Agency* § 12 (4th ed. 1952); Restatement (Second), *Agency* § 12 (1958). Nothing could be clearer, on the Findings, than that Wenzell never had, and never purported to exercise, any such authority.

Moreover in order to qualify Wenzell would have had to "transact" business. Transact means that he would have had "to prosecute negotiations; to ~~carry on business~~; to have dealings; * * * to carry through; to bring about." *Webster's New International Dictionary* (2 ed.).

One of the authorities cited in petitioner's brief (pp. 36, 53) says that one of the elements necessary to prove a violation of §424 is:

"a clear showing that such officer has been employed or has acted 'as an officer or agent of the United States for the transaction of business' with such corporation or entity. That element, too, presents a mixed question of fact and law, and its establishment will depend largely upon the factual showing made in each case as to the legal responsibilities of the officer concerned and the functions actually performed by him." *Compilation of Certain Memoranda Prepared by the Office of the Senate Legislative Counsel on Conflict of Interest Statutes*, Senate Committee on Armed Services, 84th Cong., 1st Sess. p. 20 (1955).

As the Findings demonstrate and as we have shown above (*supra*, pp. 8-23, 26-27), Wenzell's activities were not of such a character as to constitute transaction of business for the United States. He had no authority to negotiate, to carry on business dealings, or to bring about anything for

or on behalf of petitioner. There is no finding that he at any time sat down with representatives of the sponsors and negotiated, even with respect to their proposals. With the whole panoply of Government personnel who had anything to do with either the proposals or the contract available to petitioner as witnesses, it was unable to show that Wenzell ever said anything at any meeting except to disclaim his own qualifications as to overall costs, express the opinion that the estimates of costs in the February 25 proposal were too high, and contribute the First Boston opinion on the probable money market.

Moreover, Wenzell's activities were too remote from the contract to have any effect on it. His activities as a Budget Bureau consultant related almost exclusively to the rejected February 25 proposal (*supra*, p. 12, *et seq.*). And before Wenzell can have been held to have violated § 434 as to this particular contract, it must have been found, not only that he had some sort of interest in the contract, but that he also transacted business as an officer or agent of the United States in connection with that contract.

Thus, in *Architects Building Corp. v. United States*, 98 Ct. Cl. 368 (1943), the court held that the Government official did not transact business within the meaning of 18 U. S. C. 434 because "his connection" with the contract negotiations was "so slight and minor that we do not think the interests of the Government could in any way have been affected" (98 Ct. Cl. at 379).*

* As petitioner points out, in *Ingalls v. Perkins*, 33 N. M. 269, 263 Pac. 761 (1927), the court held that the plaintiff's "interest was too remote to constitute a conflict under the statute" because "he had no influence over the assignment of patients to a particular institution" (Pet. Br., p. 71).

Similarly, the Attorney General in 40 Ops. Att'y Gen. 168, upon which petitioner relies, advised that certain persons might come within the prohibition of Section 434 because "the degree of relationship of the officer to the procurement process would be such as to constitute 'the transaction of business with such corporation' as used in the statute" (p. 170).

On the other hand, in *Rankin v. United States*, 98 Ct. Cl. 357 (1943), the Court of Claims held void a Government contract in which the Government official was interested because of the definite connection between the official's governmental activities and the contract:

"He did not take merely a perfunctory part but was the prime mover to secure and retain the space rented to his partnership as the offices for the Works Agency, of which he was Director" (98 Ct. Cl. at 366).

Many of the cases cited in petitioner's brief are distinguishable in that they involved statutes which do not require any transaction of business or other activity by the public official in his official capacity in order to affect the validity of the contract. *Prosser v. Finn*, 208 U. S. 67, *Waskey v. Hammer*, 223 U. S. 85, *Ewert v. Bluejacket*, 259 U. S. 129. Typical of the statutes in these cases is that in the *Prosser* case, which was as follows:

"The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office" (208 U. S. at 68).

Similarly, many of the State cases cited by petitioner involved similar statutes. *Nunemacher v. Louisville*, 98 Ky. 334, 32 S. W. 1091 (1895); *Hobbs, Wall & Co. v. Moran*, 109 Cal. App. 316, 293 Pac. 145 (1930); *Lesieur v. Rumford*, 113 Me. 317, 93 Atl. 838 (1915); *Bartley, Inc. v. Town of Westlake*, 237 L. 413, 111 So. 2d 328 (1959); *City of Northport v. Northp. Townsite Co.*, 27 Wash. 543, 68 Pac. 204 (1902); *Edward E. Gillen Co. v. Milwaukee*, 174 Wisc. 362, 183 N. W. 679 (1921); *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924); *Yonkers*

Bus, Inc. v. Maltbie, 23 N. Y. S. 2d 87 (Sup. Ct. Albany County 1940), aff'd, 260 App. Div. 893, 23 N. Y. S. 2d 91 (3d Dep't 1940).

Moreover, mere preliminary contact with a matter, which is terminated before definitive action is taken, cannot be considered to be the transaction of business. This is demonstrated by *Cobble Close Farm v. Board of Adjustment*, 10 N. J. 442, 92 A. 2d 4 (1952). In that case, an attack was made upon a quasi-judicial judgment of a local Board of Adjustment, which refused to grant a building permit and denied an application for zoning variance. The basis of the attack was that one Booker, who was a member of the local Board of Adjustment, had an adverse interest. Booker attended one hearing, sat through that hearing after having been challenged, and later viewed the premises with members of the board. The hearing was adjourned then for one week.

In sustaining the action of the board, the Supreme Court of New Jersey in an opinion by Mr. Justice Brennan, then a Justice of that court, stated:

"Before the taking of testimony was resumed Mr. Booker voluntarily withdrew from further participation in the proceedings. He took no part whatever in the deliberations or vote upon the decision. The trial court found no evidence that the decision of the members of the board who did take part therein was in any manner influenced by Mr. Booker. Upon our independent review of the record we reach the same conclusion" (92 A. 2d at 10).

The only authority which petitioner cites as if it were to the contrary is *Edward E. Gillen Co. v. Milwaukee*, 174 Wisc. 362, 183 N. W. 679 (1921). However, this was a case in which the offending city commissioner was a salaried superintendent of the contractor but nevertheless participated in consideration of the plans on the basis of which advertisements for bids were published by the city, voted to approve such plans, and passed upon the competence

and reliability of bidders. Moreover, under the contract there were clear, direct and immediate conflicts between the commission and the contractor on such matters as increasing or diminishing the work to be performed (183 N. W. at 681).

If prior withdrawal by Wenzell from the matter was not effective in this case, then petitioner's statement that there was a simple remedy at hand which could readily be applied (Pet. Br., p. 76) is a hoax. At pages 42-63 of its brief, petitioner has so "infected" this contract with what it alleges were Wenzell's "decidedly significant" activities and "subconscious" motives before the sponsors even considered the possibility that First Boston might be hired as a financial agent, that at all times thereafter (*i.e.*, subsequent to February 25, 1954), it was already too late for what the sponsors actually did or what petitioner now recommends to do any good.

As the court below points out:

"If, then, the Government intends to treat the possible indirect interest of a consultant's employer as injecting a taint of illegality into any contract which might eventuate, the whole transaction becomes futile nonsense, a nullity before the beginning of even preliminary discussion" (R. 18).

III.

Wenzell was not "directly or indirectly interested" in the contract during the time he was a Budget Bureau consultant.

Wenzell was not an officer, agent or stockholder of respondent or even of its sponsoring companies. He had no direct or indirect interest in their pecuniary profits. Therefore, he could satisfy the required "interest" relationship

under 18 U. S. C. 434 only by having an interest in the contract of respondent.

No finding was made that Wenzell had any interest in respondent's contract with the Government. Obviously there could have been no present pecuniary interest in that contract during Wenzell's Budget Bureau consultancy, since the contract was not in existence at that time. At most, an inference might have been drawn, which the court below did not draw, that Wenzell had a hope that, if subsequently negotiations were decided upon by the Government and such negotiations resulted in a contract, and if respondent decided to use the services of a financial agent in negotiating financing with institutional investors, First Boston might get the job (*supra*, p. 39). That hope was somewhat enhanced by First Boston's past history as financial agent for Ohio Valley Electric Corporation (F. 68, R. 84).

But the "ifs" involved were big "ifs" indeed. Dodge, Director of the Budget Bureau, was certainly in a position to know the situation. The finding is that, as late as March 9, "there was no proposal that could be used for a basis of negotiation, and Dodge felt that there would be a long period of negotiations and that many preliminary approvals would have to be obtained before the question of financing would arise" (F. 85, R. 95). Events proved that Dodge was right.

At no time during Wenzell's consultancy was there any assurance whatever that negotiations for a power contract would even start. That decision was not made by the President until June 14, 1934 (F. 130, R. 119), almost three months after Wenzell "had turned everything over to Adams" of the FPC, who had been called in by the Bureau to advise it on costs of the project (Fs. 92, 94, R. 99) and

over two months after the last contact of any kind between Wenzell and the Bureau.

There was no certainty that a financial agent would be utilized to negotiate the financing if a contract should eventuate. Many companies negotiate their own financing, and the employment of a financial agent depends upon such factors as the time of executives available for negotiations with institutional investors.

Even if it were subsequently determined that a financial agent should be utilized, it was by no means a foregone conclusion that First Boston would be the banking house selected. Other banking houses had been consulted on several occasions by a representative of respondent (Fs. 62, 101, R. 79, 103). As Judge Madden stated in the majority opinion below:

"That the sponsors did not feel that they were, somehow, under an unexpressed but honorary commitment to First Boston is evident from the fact that, when the time came, in May, to make arrangements for the financing of the hoped for project, Dixon, as we have seen, insisted over the objection of First Boston that Lehman Brothers should have a 40 percent interest in the financing, because that firm had some special talents that might be of use" (R. 16).

The majority opinion also stated:

"There is not a shadow of evidence that it [First Boston] had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of the corporation

which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding" (R. 20).

The courts hold that a public official has no direct or indirect interest in the government contractor's pecuniary profits or contracts unless there is some relationship or understanding between the public official (or the public official's private employer) and the government contractor during his governmental activities relating to the government contract. In the absence of such relationship or understanding, any subsequent dealings between the public official and the government contractor are held to be immaterial in so far as the validity of the contract is concerned. Thus, in *Fredericks v. Borough of Wanaque*, 97 N. J. L. 165, 112 Atl. 309 (1920), a city councilman who was a member of a committee which let a contract to erect signs and build snowplows for the city, subsequently sold lumber to the contractor, which was needed by him in connection with the performance of the contract. Holding that these subsequent dealings did not invalidate the contract, the court stated:

"But we are referred to no case which intimates that, in the absence of a corrupt understanding or agreement of the contractor with the member of council voting for the contract, or the purpose of evading the provisions of the Crimes Act, a resolution of the municipality, otherwise legal, is rendered illegal by the subsequent action of the contractor in purchasing his material from a recognized source of supply, the proprietor of which happens to be a member of the governing body which awarded the contract, and that the contract itself thereby becomes nugatory. The contention of the defendant quite obviously is resolvable upon the fallacious argument of conduct *post hoc* and not *propter hoc*;

for manifestly the test of the legality of the contract must be determined as of the time when the resolution was passed, and not by the free act of the plaintiff in purchasing materials. If it was free of criminal taint at its inception, the subsequent action of the contractor in executing the contract cannot relate back, so as to invalidate it, unless such *ex post facto* action can be connected with a prior corrupt agreement or understanding with a member of the governing body, in pursuance of which the resolution was passed" (112 Atl. at 309-310).

To the same effect are *People v. Southern Surety Co.*, 199 Mich. 30, 165 N. W. 769 (1917); *Panozzo v. City of Rockford*, 306 Ill. App. 443, 28 N. E. 2d 748 (1940); *Escondido Lumber Co. v. Baldwin*, 2 Cal. App. 606, 84 Pac. 284 (1906); cf. *Wayman v. City of Cherokee*, 204 Ia. 675, 215 N. W. 655 (1927); 6 Williston, *Contracts* § 1735, n. 5 (Rev. ed. 1938).

In all these cases, there was a possibility of future dealing, since the future dealing in fact occurred. And in all these cases the courts refused to find the validity of the contracts in any way affected.

Petitioner contends that:

"State courts which have considered the question have held that the interest of a prospective subcontractor constitutes an 'indirect interest' sufficient to invalidate a prime contract under similarly worded conflict-of-interest statutes" (Pet. Br., p. 52).

But the case primarily relied upon by petitioner in support of this proposition in fact points up the necessity, as did the court below in this case, of some understanding between the prime contractor and the prospective subcontractor during the time the public official is participating in govern-

mental activities relating to the prime contract. *City of Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204 (1902), as pointed out by petitioner, involved a situation where:

"Prior to the formal execution of the contract, there had been an understanding between the prime contractor and the councilman that his firm would supply the necessary lumber if the prime contractor's bid was accepted" (Pet. Br., p. 53).

In the present case the Findings, as stated above, are to the contrary. Wenzell became inactive in his consultancy March 23 (F. 94, R. 99), and his consultancy terminated completely April 3 (F. 106; R. 106). The financing arrangements were not made until May 12; in fact, as late as that date respondent felt perfectly free to give 40% of the financing agency to Lehman Brothers, and did just that (F. 113, 116, R. 111, 113).

The other case cited by petitioner, *Bissell Lumber Co. v. Northwestern Casualty & Surety Co.*, 189 Wisc. 343, 207 N.W. 697 (1926), is not in point because the statute in that case not only prohibited public officers from having pecuniary interest in a public contract, but also prohibited officers from acquiring any such interest.

Petitioner discusses *United States ex rel. Marcus v. Hess*, 317 U. S. 527, in connection with two points: (1) the principles relating to the interpretation of criminal statutes, and (2) the thought that "absence of privity did not deprive the United States of the statute's protection" (Pet. Br., p. 54).

With respect to the second point, respondent is at a loss to understand the relevance of petitioner's argument that "Congress was not concerned with the niceties of privity" (Pet. Br., pp. 54-55). The question is whether

Wenzell was "directly or indirectly interested" in the contract of respondent with the Government. The issue is not one of privity, but simply the necessity of proving some connection between an alleged interest of Wenzell and respondent's contract. Wenzell's alleged "interest" cannot be drawn out of the air.

With respect to principles of interpreting criminal statutes, while the *Marcus* case does say, as stated by petitioner, that they should not be interpreted with "utmost strictness," the decision also holds that in construing a criminal statute the court "must give it careful scrutiny lest those be brought within its reach who are not clearly included" (317 U. S. at 542).

Marcus also stands for another principle, relevant to the comment of Chief Justice Jones in the instant case, that this is not "a criminal prosecution in which it is incumbent upon the defendant to establish criminal intent" (R. 42). That principle is that words used in criminal statutes should be interpreted in the same way no matter what type of case is involved. Thus, speaking for this Court, Mr. Justice Black said:

"... we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer" (317 U. S. at 542).

To the same effect is the opinion of Mr. Chief Justice Warren, speaking for the Court in *Federal Communications Commission v. American Broadcasting Co.*, 347 U. S. 284, 296:

"It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of

Justice. If we should give §1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly."

The extremes to which petitioner is driven in attempting to make out a case in this indirect criminal prosecution of Wenzell are demonstrated by its request that this Court convict Wenzell, not for what he did, but for what he had "a clear opportunity" to do (Pet. Br. pp. 51-52), or what he had "a clear economic reason to do" (Pet. Br. p. 52), or what he "could well have [been] led" to do (Pet. Br. p. 56), or even what he "might" have done (Pet. Br. p. 60). The Findings, of course, show that there was nothing adverse to the Government which Wenzell could or might have done within the scope of his assigned duties. But even if there were, petitioner's argument that a citizen can be convicted, not for what he does, but for what he has an opportunity to do or might do, is indeed a strange doctrine. Such a doctrine was rejected by the court in an analogous case, *Escondido Lumber Co. v. Baldwin*, 2 Cal. App. 606, 84 Pac. 284 (1906). In that case the court condemned the defense set up by

"a public corporation, which has received all to which it was entitled, and which seeks to avoid the payment of an honest obligation on account of a mere surmise that the possibility of profit from a subsequent independent contract had an influence upon the minds of the officials connected with the execution of the original contract" (84 Pac. at 285).

Petitioner fails to distinguish between "indirect" and "remote." Obviously an interest can be either direct or

indirect and still be so remote as to have no effect. "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *Van Itallie v. Borough of Franklin Lakes*, 28 N. J. 258, 146 A. 2d 111, 116 (1958).

In the cases cited by petitioner the interest was immediate and not remote. For example, in *Yonkers Bus, Inc. v. Maltbie*, 23 N. Y. S. 2d 87 (Sup. Ct. Albany County 1940), aff'd, 260 App. Div. 893, 23 N. Y. S. 2d 91 (3d Dep't 1940), the court decided that there were triable issues of fact where the allegations were that one of the aldermen who voted for a bus franchise was president of the company awarded the franchise. A more immediate interest would be difficult to imagine.

Edward E. Gillen Co. v. Milwaukee, 174 Wis. 362, 183 N. W. 679 (1921) is similarly distinguishable. See discussion *supra*, pp. 52-53.

IV.

In any event the issue in this case is not solely whether Wenzell is guilty of violation of 18 U. S. C. 434. The petitioner must also establish that, on all the facts as found by the court below, public policy requires that the Court declare this concededly fair and honest contract unenforceable by respondent.

While most of petitioner's brief reads as if this were a criminal proceeding against Wenzell for a violation of 18 U. S. C. 434, it is plain even from petitioner's own statement of the "Question Presented" that the real issue in the case is whether Wenzell's activities as disclosed by the Findings were such as to enable the Government to repudiate its obligations under a concededly fair and honest con-

tract. Moreover, it is apparent from a careful examination of petitioner's brief itself that such a result would follow only from the existence of many factors besides Wenzell's alleged violation of that statute.

For 18 U. S. C. 434 is a penal statute and contains no "sanction of contract unenforceability" at all. Moreover, the statutory history of the Act indicates that such a provision was deliberately omitted by Congress. Under these circumstances, such a sanction will not be added judicially unless public policy clearly so requires. Moreover, it is clear from an examination of the cases cited in petitioner's brief that public policy does not require—in fact, does not permit—the invocation of such a sanction unless the alleged illegality is so inherent in the contract that it cannot be enforced without making the court a party to the violation of law, enforcement would aid the wrongdoer in profiting by his own wrong, or a Government contracting officer purports to enter into a contract which he is forbidden by law to make, so that the Government cannot be bound by his illegal act.

It is clear from the Findings in this case that no such situation is present here: the AEC was expressly authorized by Congress to make this very contract; neither Wenzell nor his private employer, First Boston, the so-called "wrongdoers," can profit by one penny through the enforcement of the contract; and it is not contended that Wenzell either had the power to or purported to bind the Government in any way. On the contrary, his activities were remote from and collateral to the making of this contract between the AEC and respondent.

Finally, the Findings disclose beyond peradventure that respondent not only recommended but effectively brought about the very steps leading to the timely termination of Wenzell's consultancy which the Attorney General, the

Bureau of the Budget and the AEC, as well as many other Government agencies presently prescribe as the proper procedure in dealing with such a situation. (See *infra*, pp. 84-85).

Thus, there is no basis whatever for petitioner's contention that public policy requires that the contract be held unenforceable by respondent. On the contrary, public policy requires that this fair and honest obligation of the United States be honored and performed.

A. Courts will not add a sanction of contract unenforceability to those imposed by Congress in a penal statute such as 18 U. S. C. 434 unless the alleged illegality is so inherent in the contract or the cause of action that the contract cannot be enforced without giving judicial sanction to the unlawful act.

While §434 is merely a penal statute and contains no suggestion that the consequences of a violation will be the invalidation of contracts, petitioner argues that, nevertheless, "this result follows from the clear language and evident purpose of the statute" (Pet. Br., pp. 68-69). We submit that the statutory history of the Act and the very cases cited by petitioner establish exactly the opposite.

1. Congress deliberately refrained from including a blanket sanction of unenforceability in 18 U. S. C. 434.

As pointed out by petitioner at page 68, footnote 22, "18 U. S. C. 216 [the so-called anti-bribery statute] is the only conflict-of-interest statute expressly providing for disaffirmance of contracts made in violation of its terms." Yet 18 U. S. C. 434, which was adopted at approximately the same time as 18 U. S. C. 216, contains no such provision. This difference was not due to inadvertence. For the statutory history shows that at the time Congress was con-

sidering and adopting these conflict-of-interest statutes, it was actively debating the significance and desirability of that very provision.

As originally drafted, §216, after providing criminal sanctions for obtaining a government contract by bribery, contained a further provision that any contract obtained by such means "shall moreover be absolutely null and void." *Cong. Globe*, 37th Cong., 2d Sess. p. 2958 (June 27, 1862). During the summer of 1862, it was urged on the floor of the Senate that this provision was too drastic, since it might deprive the Government of a contract which, despite the bribery, was advantageous. *Ibid.* Although the author of the bill insisted that the more drastic sanction would more effectively carry out the purposes of the Act, this provision was abandoned in favor of the less stringent provision that a contract obtained by bribery "may, at the option of the President of the United States, be absolutely null and void." 12 Stat. 578 (July 16, 1862). The following winter §216 was amended so as to broaden its coverage (12 Stat. 696 [Feb. 25, 1863]), and a few days later, the predecessor of §434 was adopted (12 Stat. 698-99 [Mar. 2, 1863]). Thus it is plain that Congress considered that criminal sanctions directed against any individual who engaged in business on behalf of the Government with a business entity in which he had an interest would adequately protect the Government from representation by a potentially disloyal officer or employee. Yet petitioner now asks this Court to add the very sanction which Congress had refused to adopt in enacting the companion §216—a section directed to the far more serious offense of bribery.

2. This Court has repeatedly held that a sanction of unenforceability will not be added to a penal statute unless absolutely required by considerations of public policy which are manifest on the facts of a particular case.

In support of its contention that invalidation of contracts follows from any infringement of §434, no matter how remote and immaterial in the context of the facts of the case, petitioner cites *Frost & Co. v. Mines Corp.*, 312 U. S. 38. To be sure, that case squarely raises the issue on which petitioner now relies:

“Although the challenged contract bears no evidence of criminality and is fair upon its face, we are asked to apply a sanction beyond that specified by declaring it null and void because of relationship to a public offering [i.e., a violation of Section 5 of the Securities Act of 1933]. The basis for this demand is a supposed federal public policy which requires such annulment in order to secure observance, effectuate the legislative purpose and prevent noxious consequences” (312 U. S. at 42-43).

But after stating that such a sanction had often been added “where the circumstances fairly indicated this would further the essential purpose of the enactment” (312 U. S. at 43), the Court, despite the assumed violation of the Securities Act, refused to apply the requested sanction and upheld the contract.

Thus, that case is but one of a long line of cases* in which this Court has repeatedly refused to add judicially

* *National Bank v. Matthews*, 98 U. S. 621; *Fritts v. Palmer*, 132 U. S. 282; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227; *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165; *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590; *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248; *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743; *Kelly v. Kosuga*, 358 U. S. 516.

a sanction of contract unenforceability, to a penal statute for a violation of which Congress had provided criminal sanctions, except where the alleged illegality was so inherent in the contract itself, or in the plaintiff's cause of action, that the contract could not be enforced without giving judicial sanction to the illegal act. As stated by this Court, in rejecting a defense of illegality based on a seller's violation of the Robinson-Patman Act (15 U. S. C. 13):

"It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the Act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the Act made no provision for it; * * * that not one word suggesting its consideration appears in the debates of Congress * * *"
Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743, 750-51.

Since 18 U. S. C. 434 does not by its terms forbid the bargain, the ultimate issue in this case is not whether Wenzell is guilty of a violation of §434 (in which case, he should be fined and sent to jail, as Congress prescribed) but whether this Court should, on the facts now before it, act judicially to add a sanction preventing third parties from enforcing the contract, even though Congress did not see fit to do so.

3. The cases cited by petitioner show that a sanction of unenforceability will be invoked only when the illegality is inherent in the contract itself or where enforcement would enable the wrongdoer to profit by his own wrong.

As appears both from an examination of the foregoing cases and those cited by petitioner, a situation requiring the addition of a sanction of unenforceability arises only when the subject matter of the contract itself is illegal (i.e., the bargain is in terms forbidden by statute), or where the wrongdoer himself would profit by his own wrong if the contract were enforced. In most cases both these elements are present. Thus, petitioner seeks support from the "familiar law that contracts which in their formation or performance violate prohibitory statutes are unenforceable" (Pet. Br., p. 69). But it is clear from the very cases cited in support of this proposition that this is but another way of saying that the courts will neither enforce a contract when its subject matter is unlawful nor lend judicial aid to a wrongdoer.

Thus, in *Miller v. Ammon*, 145 U. S. 421, the plaintiff was suing to collect the price of liquor he had sold without a license in violation of a penal statute. In rejecting his claim, the Court said:

"The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover" (145 U. S. at 426).

Similarly, in *Burck v. Taylor*, 152 U. S. 634, the plaintiff was seeking to enforce an assignment of a contract to build a new capitol building for the State of Texas. The contract in terms provided that it could not be assigned without the consent in writing of the State, which had not been obtained. Analogizing the contract provision to a

statute, this Court held that the plaintiff could gain no rights by the unlawful assignment. And in *Bank of the United States v. Owens*, 27 U. S. 338 (2 Pet. 527), this Court refused to permit the Bank of the United States to enforce a usurious note made in direct violation of the Bank's charter on the ground that the Court would not "become auxiliary to the consummation of violations of law" (27 U. S. at 346). The same general factual situation will be found upon an examination of other cases cited by petitioner in support of its contention that a contract made in violation of a statute is unenforceable.*

It is plain that all these cases are based on both of the above mentioned criteria on which the courts rely when they invalidate a contract because of the violation of a statute not containing a sanction of unenforceability: the illegality is so inherent in the plaintiff's cause of action that the contract could not be enforced without making the courts a party to the illegal act, and in each case the wrongdoer would profit from his own wrong if the contract were enforced. As Professor Williston states the latter principle:

"It is commonly said that illegal bargains are void. This statement, however, is clearly not strictly accurate. . . . When relief is denied it is either because the plaintiff is a wrongdoer, and such a person the law does not aid, or, in exceptional cases, because the transaction is declared absolutely void by the law." 5 Williston, *Contracts* §1630 (Rev. ed. 1937).

* *E.g.*, *Deitrick v. Greaney*, 309 U. S. 190 (Pet. Br., p. 69) and *Kimen v. Atlas Exchange National Bank*, 295 U. S. 215 (Pet. Br., p. 69) (contracts which violated express prohibitions contained in the National Bank Act); *Ewert v. Bluejacket*, 259 U. S. 129 (Pet. Br., p. 64), *Waskey v. Hammer*, 223 U. S. 85 (Pet. Br., p. 39) and *Prosser v. Finn*, 208 U. S. 67 (Pet. Br., p. 64) (purchases of land by Government agents which were in direct violation of statutes prohibiting such purchases).

4. So far as the municipal cases cited by petitioner are relevant at all, they merely add support to the foregoing principles.

Petitioner also cites numerous cases in the field of municipal law,* in which a city council or municipal commission authorized a contract in which one of its members had an interest, in violation of a statute prohibiting such interest. *City of London Electric Lighting Co. v. London Corp.* [1903] A. C. 434 (House of Lords); *Finch v. Riverside & A. Ry.*, 87 Cal. 597, 25 Pac. 765 (1891); *Miller v. City of Martinez*, 28 Cal. App. 2d 364, 82 P. 2d 519 (1938); *Watson v. City of New Smyrna Beach*, 85 So. 2d 548 (Fla. 1956); *City of Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204 (1902). At the outset, it should be noted that in all but one of these cases (*Finch v. Riverside & A. Ry.*) the city charter or other local law expressly declared that any contract in which a city official had an interest should be absolutely void. Thus they are irrelevant to the problem before us.** Nevertheless, it is primarily on

* (Pet. Br., p. 69).

** It is interesting to note that the *Northport* case was severely limited by the same court seven years later in *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272 (1909). In that case, *Northport* had been cited as authority for the proposition that a city contract was void because the mayor had become interested in the principal contract, as a subcontractor. In limiting this contention the court said:

"Although the construction put upon the *Northport* Case by respondents may seem warranted, yet we cannot think that it was ever the intention of the court to hold that a dealing on the part of the contractor with a city officer would do more than avoid a contract pro tanto. . . . The statute is aimed at the officer, and intended to prevent a recovery on his part or to the extent of his interest when the claim is asserted by another. This object is attained when the amount of his interest is determined and rejected". (104 Pac. at 274).

Thus, under the *Northport* case, as so limited, respondent could recover under the contract at bar even if §434 contained a sanction

these and other similar cases that petitioner relies for the proposition that fairness, good faith, full disclosure, etc. are irrelevant. As applied to such a statute we have no quarrel with that proposition. No court can, on any ground whatever, validate a contract which is expressly declared invalid by statute.

In any event, in these cases (including *Finch v. Riverside & A. Ry.*, *supra*), as well as the many other municipal cases cited elsewhere in petitioner's brief,* the wrongdoing city official would profit through his unlawful interest if the contract were enforced. It is hornbook law that a municipality cannot be bound by a contract made by an unauthorized officer or agent. Thus, if a member of the contracting body was forbidden by law to make the contract, it is unenforceable. And this is true even in the absence of statute, for it is well recognized at common law that it is unlawful for a public official, as a public trustee, to deal with himself. Thus these cases might be relevant if a member of the AEC had been an officer or stockholder of the plaintiff, but they are obviously irrelevant here: In the first place, Wenzell had no power to make, and did not purport even to negotiate the present contract. In the second place, neither he nor First Boston can gain one

of unenforceability. Only Wenzell himself, or possibly First Boston, would be barred from recovering a commission if it could be shown that Wenzell had violated the statute.

* *Schaefer v. Berinstein*, 140 Cal. App. 2d 278, 295 P. 2d 113 (1956); *Hobbs, Wall & Co. v. Moran*, 109 Cal. App. 316, 293 Pac. 145 (1930); *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020 (1924); *Hardy v. Mayor, etc. of City of Gainesville*, 121 Ga. 327, 48 S. E. 921 (1904); *Nunemacher v. Louisville*, 98 Ky. 334, 32 S. W. 1091 (1895); *Bartley, Inc. v. Town of Westlake*, 237 La. 413, 111 So. 2d 328 (1959); *Lesieur v. Rumford*, 113 Me. 317, 93 Atl. 838 (1915); *Duncan v. City of Charleston*, 60 S. C. 532, 39 S. E. 265 (1901); *Edward E. Gillen Co. v. Milwaukee*, 174 Wis. 362, 183 N. W. 679 (1921).

penny by the enforcement of this contract. Consequently, enforcement of the contract will not require the Court to sanction Wenzell's activities, and would not require such sanction even though, contrary to the Findings, they were legally questionable.

But in any event, these municipal cases shed little light on the question of how this Court should apply 18 U. S. C. 434. The cases most relevant to this lawsuit are those in which this Court and other federal courts have been confronted with a contention that a contract of the United States is void because of an alleged violation of that section.

5. The principles which would permit recovery by respondent here have been consistently applied whenever the United States has sought to avoid a contractual obligation on the ground of an alleged violation of 18 U. S. C. 434.

So far as we are aware, the Government has raised an alleged violation of 18 U. S. C. 434 as a defense to a contract in six cases: *Muschany v. United States*, 324 U. S. 49; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1; *Rankin v. United States*, 98 Ct. Cl. 357 (1943); *Architects Building Corp. v. United States*, 98 Ct. Cl. 368 (1943); *United States v. Grace Evangelical Church*, 132 F. 2d 460 (5th Cir. 1942); and *The Curved Electrototype Plate Co. v. United States*, 50 Ct. Cl. 258 (1915). But the defense was sustained only in *Rankin* and *Curved Electrototype*, and in each of these the elements requiring judicial invalidation of the contract were clearly present. Thus Rankin, sole surviving partner of the lessee of certain premises, occupied such premises as offices for himself and his staff in his capacity as Regional Director of the WPA. No formal sublease was ever executed with the Government. Later he brought suit against the Government for the fair rental value of the premises. In disposing of his claim, the Court of Claims said:

"The rule . . . is that an act done in violation of the statutory prohibition is void and confers no rights upon the wrongdoer. It would be strange indeed to allow the plaintiff to recover a reasonable rental value for the space controlled by him when the statute makes it a crime punishable by fine and imprisonment for him to act for the Government and deal with himself" (98 Ct. Cl. at 367).

In *The Curved Electrotype Plate Co. v. United States*, 50 Ct. Cl. 258 (1915), the complaint alleged an express or implied contract with the Public Printer for the use of the plaintiff's patents and demanded a reasonable compensation for such use. The person who was the Public Printer was also an organizer and former stockholder of the plaintiff corporation and still claimed an equitable interest in its earnings. The Court of Claims denied recovery on the ground, *inter alia*, that there could not have been an implied contract because

"The Public Printer could not act for the Government so as to bind it when he had an interest direct or remote in the subject matter of the contract" (50 Ct. Cl. at 272).

Thus in each of these cases the acts of the Government official which were alleged to have bound the Government were in direct violation of the Act; in each the wrongdoer would have profited by enforcement of the contract, and in each the court could not enforce the contract without giving judicial sanction to a statutory violation.

In the other four cases the defense of illegality was rejected as a matter of public policy even though in each the facts disclosed a literal violation of the Act.

Thus in *Architects Building Corp. v. United States*, 98 Ct. Cl. 368 (1943), decided by the Court of Claims

on the very day that it rejected Rankin's claim, *supra*, the building corporation which owned the building involved in both cases was permitted to recover the reasonable rental value of premises other than those in which Rankin himself had a personal interest, even though Rankin was simultaneously president and stockholder of the building corporation, and Regional Director of the WPA, the lessee. Recovery was permitted on the ground that Rankin himself would receive, no personal benefit from a judgment in the corporation's favor since he received no salary as president and the stock was virtually worthless, and on the further ground that he had taken no personal part in the negotiations between the WPA and the corporation.

In *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, the Government sought to set aside a sale of patents made by a prior administration on the ground that the sale was void under 18 U. S. C. 434. Here the Alien Property Custodian, pursuant to Congressional authority, had set up a Chemical Foundation in which he and other officials of his department were directors and officers and had sold certain patents seized from enemy aliens during World War I to that Foundation. The Government contended that the sale was void under §434 because the officials who had sold the patents were officers of the corporation that had purchased them. The Supreme Court refused to invalidate the Government contract by which the patents were sold, concluding that the transactions complained of did not involve the evils at which the statute was aimed. With regard to §434 the Court stated:

"It is a penal statute and is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose" (272 U. S. at 18).

It will be observed that in each of the foregoing cases there was clearly a literal violation of §434:

“ . . . an officer . . . of [a] corporation . . . [was] employed . . . as an officer or agent of the United States for the transaction of business with such business entity . . . ”

The most compelling authority in support of respondent's position here is presented by the cases of *Muschany v. United States*, 324 U. S. 49, and *United States v. Grace Evangelical Church*, 132 F. 2d 460 (7th Cir. 1942). Those cases dealt with a practice whereby the War Department had retained agents to negotiate options for the sale of land needed by the Department. The agent's commission was to be 5% of the purchase price and was to be paid by the seller. Upon acceptance by the War Department, the options became contracts. Thus the Government agent had a pecuniary interest in the contract he was negotiating with the landowners, a pecuniary interest which was in direct conflict with that of the Government. As was brought out by Justice Black in his dissenting opinion in *Muschany*:

“For the terms of McDowell's [the Government's purchasing agent] contract, which was an integral part of the purchasing system here involved, were such that the harder he worked to reduce the price of the land he bought, the less he made. He could not possibly serve most profitably his own interest and that of the government at the same time. Only by acting to the financial disadvantage of the government could he act for the financial advantage of himself”. (324 U. S. at 72).

When it began to appear that the agents were recommending acceptance of options at exorbitant prices, the War Department stepped in and attacked the contracts on two grounds: (1) that they were void under the express statutory prohibition against the use of the “cost-plus-a-percentage-of-cost” form of contract contained in the

National Defense Act of 1940,* and (2) that in any event the Government agent's obvious conflict of interest rendered the contracts void as a matter of public policy, as established by §434 as well as the bribery statute and the statute prohibiting Government agents from accepting or receiving money from third parties (18 U. S. C. 216, 281). *Muschany v. United States*, 324 U. S. at 54, 67.

Thus, in these cases the courts had both types of conflict-of-interest statutes before them: (1) a statute specifically prohibiting cost-plus-a-percentage-of-cost contracts, and (2) statutes making it a crime for Government representatives to engage in transactions involving a conflict of interest.

Throughout the litigation all parties and all judges assumed that if the contracts were cost-plus-a-percentage-of-cost contracts, they were in violation of the statute and void. The only difference of opinion was whether they were contracts of the prohibited type.

On the public policy issue, the Government counsel and the dissenting opinions emphasized that the contracts had been negotiated by a Government agent who had an interest in direct conflict with that of the Government. However, neither of the dissenting opinions suggested that the contracts were void or unenforceable because of violation of §434. They contended that the contracts were void because of considerations of public policy which would exist if §434 had never been enacted.

Thus the *Muschany* and *Grace Church* cases illustrate the principle that "except where bargains are in terms forbidden by statute, the common law, whenever it refuses to enforce them, though they comply with the ordinary require-

* "Provided further, that the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War" (54 Stat. 713, July 2, 1940).

ments for the formation of contracts, so decides on the basis of public policy." 5 Williston, *Contracts* §1628 (Rev. ed. 1937). Clearly, if §434 operated to outlaw contracts involving a violation of that section, these contracts would of necessity have been held invalid simply on the proof of the Government agent's conflict of interest. But instead the courts, despite the apparent violations, directed their attention solely to the question whether public policy required the contracts to be held unenforceable.

Thus, in *Grace Church* no mention of §434 was made at all. The majority simply rejected the public policy argument on the ground that:

"Illegality arises from secret commissions, not from those known to both parties. Freedom of contract is to be preserved and where, as here, the procedure, if not instituted or suggested by the Government, was at least carried to a conclusion with its knowledge and acquiescence, it may not complain" (132 F. 2d at 462).

In *Muschany*, the majority of this Court concluded at the outset that, because the Circuit Court of Appeals had affirmed the District Court, which had found that the contracts were made in good faith, evidence of fraud, bad faith and misrepresentations contained in the record could not be considered. "Therefore this case comes before this Court without any suggestion of fraud or unfairness such as would justify holding the contracts invalid" (324 U. S. at 58).

The Court then turned to the contention that the contracts violated the prohibition against cost-plus-a-percentage-of-cost contracts and concluded that in fact they were "cost-plus-a-fixed-fee contracts," which were expressly authorized by the National Defense Act* (324 U. S. at 63).

* It is respectfully suggested that in commenting on *Muschany* in his dissent below in the instant case (R. 31-32), Mr. Justice Reed was referring to this part of the Court's opinion, rather than to the majority's decision on the public policy issue raised by the agent's conflict of interest.

The Court then dealt with Government counsel's contention that the contracts must be held unenforceable as a matter of public policy because of the Government agent's conflict of interest (324 U. S. at 64). The Court stated the issue as follows:

"In the absence of a plain indication of [a contrary public] policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy" (324 U. S. at 66-67).

The Court considered 18 U. S. C. 434 and the other sections cited by the Government, and rejected the contention that they established a public policy requiring the invalidation of a ~~contract~~ negotiated by an agent with a conflict of interest. After noting that "certainly the [Government] officers realized the possibility of and temptation to price inflation" but may have thought they could control this problem (324 U. S. at 65), the Court refused to invalidate the contracts, saying:

"It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated" (324 U. S. at 66).

Nor did Mr. Justice Black in his powerful and persuasive dissent say that the contracts were *ipso facto* void as against public policy because of the agent's conflict of interest. Instead he pointed out that the case might, upon remand, be found to involve fraud, unconscionability and unjust enrichment, and cited cases dealing with these factors. (See 324 U. S. at 82).

Here, as petitioner concedes, "the final contract with respondent turned out to be fair and honest" (Pet. Br., p. 59).

We submit that the *Muschany* and *Grace Church* cases are indistinguishable from the case at bar and conclusively support respondent's position. Indeed, the Government's position in those cases was far stronger than it is here. McDowell, the Government's agent in *Muschany*, who alone negotiated and recommended acceptance of the contracts, had a clear and obvious interest in those contracts adverse to that of the United States; there can be no doubt that his acting as "an agent of the United States for the transaction of business" with business entities (the landowners) in whose "contracts" he had an interest was prohibited by 18 U. S. C. 434. Moreover, as Mr. Justice Black pointed out in his opinion, "The landowners' rights are indissolubly intertwined with McDowell's" (324 U. S. at 77). In other words, in that case the "wrongdoing" agent himself profited through his 5% commission from the enforcement of the contracts.

On the other hand, the plaintiffs in those cases had no choice but to deal with the Government's agent on the terms prescribed by the Government. Moreover, the agent's superiors were fully aware of his conflict of interest and, at least in the majority's view in *Muschany*, the contracts came before the Court "without any suggestion of fraud or unfairness such as would justify holding the contracts invalid" (324 U. S. at 58).

Since public policy required that those contracts be enforced, despite some aroma of actual fraud disclosed by the evidence presented in the District Court, we submit that *a fortiori* the Government must not be permitted to repudiate its obligations under the contract at bar where fraud and corruption are admittedly absent (R. 17), respondent's sponsors actually brought about the removal of Wenzell long before contract negotiations were even decided on by the Government, and neither Wenzell nor his

private employer, First Boston, will in any way benefit from enforcement of this contract.

B. On the facts in this case, when considered in the light of the foregoing principles of law, it is plain that public policy requires that the contract in suit be enforced.

When the principles of law discussed in the prior point are borne in mind, it is quite apparent that there is no basis whatever for the proposition that this is a case in which public policy requires that the Court add a sanction of contract unenforceability to the criminal sanctions provided by Congress in 18 U. S. C. 434. On the contrary, public policy requires that a fair and honest contract of the Government such as that at bar be enforced. Clearly no action of Wenzell's disclosed by the record is so inherent in either this contract or this plaintiff's cause of action, that enforcement of the contract would require this Court to give judicial sanction to those activities. He was not a government contracting officer and he did not take any part in the negotiation of this contract. Indeed, the Budget Bureau itself, for which he acted as a consultant, held no more than a "watching brief" to see whether, from the standpoint of costs, it was feasible even to open negotiations for such a contract. The contract was made by the AEC, which was expressly authorized to do so by Act of Congress (Fs. 148, 152, R. 137, 140-43).

Thus no violation of any statute or other illegality can possibly be involved either in the formation or performance of this contract. Even if petitioner's characterization of Wenzell's activities could be accepted, those activities were too remote and collateral to affect the validity of this contract. As Professor Corbin puts it in terms directly applicable to petitioner's most extreme contentions:

“There are many bargains, wholly lawful in themselves, that the parties would not have made except for the fact that an antecedent illegal transaction had taken place. A mere causal relation such as this, the bargain not being substantially identical with the illegal transaction and its enforcement not being the consummation of an illegal purpose, is not ground for refusal of enforcement. The illegal transaction is in such cases described as ‘collateral’ or ‘remote.’” 6 Corbin, *Contracts* §1529 (1951).

Mr. Justice Brandeis, writing for a unanimous Court, expressed the same principle as follows:

“The bar applied is not the plea of illegality commonly interposed in suits brought to enforce contracts tainted by illegality. In those suits the illegality relied on is inherent in the cause of action; is directly connected with the relief sought; and constitutes a substantive defense. Here, the relation of the illegality to the relief sought is indirect and remote. The wrong done is a thing of the past and is collateral. By the long line of cases following *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on.” *Loughran v. Loughran*, 292 U. S. 216, 228.

It is difficult to conceive of a case in which the allegedly illegal “transaction of business” was more remote from the contract upon which suit was brought than it was here. As we have shown (*supra*, pp. 12-21), any “transaction of business” by Wenzell was first and foremost in connection with the February 25 proposal by the sponsors, a proposal which was withdrawn after March 24, 1954 (Fs. 93, 95, R. 99-100), and which never again was of any moment. Wenzell’s consultancy terminated on April 3, 1954, and the proposal of April 10 was not even drafted until after that time (Fs. 100, 106, R. 102-03, 106).

But even on the assumption that Wenzell's "transaction of business" could somehow be said to be applicable to the April 10 proposal, it would make no difference. His activities would still be too remote to affect the enforceability of the contract.

They were too remote in time, since this is not a case where the contract sued upon resulted from the acceptance of an offer, an acceptance following as a foregone conclusion immediately after the submission of the proposal and the resignation of the alleged dual agent. On the contrary, as we have shown, it was not until after Wenzell terminated his Government consultancy that the April 10 proposal was scrutinized and analyzed by the Government along with the competing Von Tresckow proposal; it was not until two and one-half months after Wenzell left that the President of the United States decided that negotiations should be opened with the petitioner; and as late as November 10, 1954, over seven months after Wenzell had left, it was still uncertain whether there would be any contract.

Wenzell's activities were too remote in causation, for the contract which was eventually worked out was negotiated for the Government by independent, single-minded representatives, was reviewed by every agency of the Government which could conceivably have any interest in the matter or expertise to contribute, and was subjected to searching scrutiny and analysis by Congress itself before the contract became a certainty and was signed. Even if, contrary to the fact, Wenzell had had the most obvious adverse interest, the contract in this case would have to be found to be the result of the admittedly independent activities of all these high officials and agencies of the Government, and not the result of anything Wenzell did.

Finally, as will be shown more fully, there can be no question on these facts that the sponsors were blameless

in relation to Wenzell's activities. For although they had no control over Wenzell himself, they initiated the very steps to bring about the timely termination of his consultancy with the Bureau which are presently prescribed by the highest legal authority in our Government (*infra*, pp. 84-85).

C. Refusal of enforcement of a fair and honest Government contract such as that at bar would be neither as effective nor as reasonable a remedy for the protection of the United States as that prescribed by Congress in 18 U. S. C. 434.

Evidently recognizing that none of the normal criteria hitherto established by the courts as a ground for invalidating contracts because of the alleged violation of a penal statute were applicable to this case, petitioner advances an additional criterion: that "non-enforcement is an effective and appropriate protection for the United States against contravention of the Congressional mandate in 18 U. S. C. 434" (Pet. Br., p. 80). But petitioner cites no cases, and we know of none, in which such a sanction has been added to penal sanctions already prescribed by Congress in the absence of the circumstances heretofore discussed.

If petitioner were truly concerned over the proper implementation of the Congressional purpose in 18 U. S. C. 434, an obviously more effective method of accomplishing that purpose would be to pursue the course prescribed by Congress itself: bring a criminal prosecution against the alleged wrongdoer, Wenzell. "It goes without saying that in all dealings with the government, contractors and agents alike are under an obligation to deal strictly within the limits of the statutes and with absolute honesty. *Criminal sanctions enforce this rule.*" *Muschany v. United States*, 324 U. S. at 59.

Surely Wenzell's conviction and punishment would be a far more effective deterrent to potential future violators of

the Act than the punishment of blameless third parties, as now proposed by petitioner. But of course petitioner did not and will not pursue that remedy since it is perfectly obvious from the Findings in this record that no such conviction could possibly be obtained. In fact, petitioner is flying directly in the face of decisions of this Court (*supra*, pp. 59-60) which have pointed out that criminal statutes are construed in the same way regardless of the type of case involved. Obviously petitioner is seeking an interpretation more favorable to it in the present case than it could possibly expect were it following the procedure prescribed by §434 and prosecuting Wenzell.

- D. The steps taken by the sponsors, Wenzell and his Government superiors to bring about the timely termination of his consultancy followed the procedures prescribed by the current regulations of the Department of Justice, as well as the AEC and the Bureau of the Budget.**

Petitioner argues at some length that the imposition of a sanction of non-enforcement against respondent would have "the important supplementary effect of inducing contractors to do more than give lip service to the public policy against conflicts-of-interests" (Pet. Br., pp. 80-81). According to petitioner, while respondent knew of Wenzell's allegedly "infecting interest, yet [it] did not take the simple steps necessary to remove that infection" (Pet. Br., p. 81). And again, "Contractors who wink should not be encouraged to expect the courts to enforce infected contracts . . ." (Pet. Br., p. 83).

This is a surprising line of argument to be advanced by the Solicitor General in the light of the steps actually taken by respondent's sponsors, as unanimously found. The conduct of respondent's sponsors, of Wenzell himself, and of his immediate Government superiors was in accord

with the procedures prescribed for such a situation by the current regulations of the Solicitor General's own department, as well as by those of the AEC, the Bureau of the Budget, and a number of other federal departments. Thus Department of Justice Order No. 145-57 entitled "Standards of Conduct Relating to Personal Business Interests, Transactions and Other Dealings of Employees" (Mar. 27, 1957), provides as follows:

"No officer or employee of the Department who owns any stocks, bonds or other financial interest in any enterprise shall participate in or make a decision on behalf of the Department concerning that enterprise. In any case in which an officer has such an interest he shall immediately disqualify himself from acting, in writing, and inform his superior of the reasons for his disqualification. He shall take no action in any such matter unless authorized to do so under the conditions prescribed by the Deputy Attorney General."

Similarly, the current regulations of the AEC (AEC Manual Chap. 4124, "Conduct of Employees" (Sept. 22, 1954)) provide as follows:

"032 b. *An employee shall notify his supervisor whenever, because of personal, family, financial or other considerations, there is a possibility that he should be disqualified from taking action on any matter with respect to which he is called upon to exercise authority or discretion, to give advice, or to make recommendations. If the supervisor concludes that the employee should be disqualified, he will relieve the employee from any duty or responsibility for the matter in question.*"

The Manual of the Bureau of the Budget itself, in Section 810, "Establishment and Observance of Standards of Conduct" (Oct. 28, 1954), provides as follows:

"§10.3 b. *Outside interests and activities.*

"An employee who intends to engage in any outside employment should inform his immediate supervisor. Any employee or supervisor who is uncertain as to the propriety of proposed outside employment should request guidance from the Personnel Officer."

Similar provisions are found in the regulations of a number of other federal departments.*

With these guides as to what the highest legal officer of the Government as well as the very departments concerned in this litigation consider to be the appropriate procedures to be taken when any question involving a potential conflict of interest arises, let us look at the record and see to what extent respondent's sponsors, Wenzell himself, or his immediate Government superiors, Dodge and Hughes, merely gave "lip service" to or "winked" at alleged violations of the law.

The Findings disclose that some time in February of 1954, Daniel James, Dixon's counsel, became concerned lest embarrassment might result from Wenzell's position with

* Department of Commerce, Order No. 77, "Conflicts of Interest and Private Business Activities of Officers and Employees," §§4, 6 (Aug. 5, 1955); Department of Defense, Memorandum entitled "Conduct of Personnel Assigned to Procurement and Related Agencies" (Jan. 28, 1957), reprinted in *Exemptions from Conflict-of-Interest Statutes in Defense Employment*, Hearings before the Military Operations Subcommittee of the House Committee on Government Operations, 86th Cong., 2d Sess., p. 65 (1960); Federal Communications Commission, FCC 54-1176, "Policy Statement Relating to the Review and Inspection Program for Detection and Prevention of Improper Conduct of Employees of the Federal Communications Commission" (Sept. 17, 1954); Federal Trade Commission, Personnel Bulletin No. 12, "Conflict of Interest", §§ V, IX (Sept. 25, 1957); Securities and Exchange Commission Manual of Administrative Regulations, Section 701, "Conduct Regulation," Rule 4 (Nov. 2, 1956).

the Government in the event that a contract should ultimately be agreed upon and First Boston should be selected to assist in obtaining the necessary financing. He discussed the problem with Dixon, and on February 23 Dixon took the matter up with Wenzell, suggesting that "Wenzell discuss the situation with the Bureau of the Budget and with his counsel" (F. 68, R. 84-85), both of whom would know or have access to all the facts regarding Wenzell's consultancy. On the same day, Wenzell discussed the matter in some detail with Hughes, who "replied that Wenzell was exaggerating the importance of the matter, but advised Wenzell to report the situation to his principals in First Boston, to explore the question with counsel, and then to talk with Dodge about the matter" (F. 69, R. 85).

Thereafter, Wenzell discussed his situation with First Boston and its counsel, Sullivan & Cromwell, and was advised by the latter to resign at once and in writing. Petitioner attempts to use the fact that Wenzell did not follow this advice to the letter. The validity of this attempt is, to say the least, highly questionable in view of the wholly inchoate state at that time of the possibility of there ever being a contract to be negotiated with respondent and the fact that Hughes had told Wenzell the matter was being exaggerated, instructed him to discuss it with Dodge, and continued to give him assignments.

In any event, even if Wenzell were at fault in following the advice of Hughes, his immediate Government superior, rather than that of First Boston's counsel, it is difficult to see what bearing that fact would have on the present claim of respondent. For the record shows that after the initial conversation with Wenzell, James followed up with Dean, First Boston's lawyer, and Dixon followed up with an official of First Boston, from whom they learned "that First Boston's counsel had advised Wenzell to resign his position

the Budget Bureau at once" (F. 78, R. 91-92). That Cran & Cromwell's advice was actually somewhat more limited and broader (F. 72, R. 87-88) is not shown ever to have been told to any representative of respondent. In other respects, so far as respondent was concerned, the matter had been referred to and acted upon by eminent counsel, who had the facts.

Meanwhile, when Dixon and James found that Wenzell was continuing to attend meetings at the Bureau, they took the matter up with Hughes later in March: "Although we had understood that Wenzell was going to resign, we had learned that Wenzell was occasionally taking part in meetings of the Budget Bureau and James wanted to know why Wenzell was continuing to act as a consultant to the Bureau. * * * Hughes made no comment on the matter" (F. 78, R. 92).

Meanwhile, on March 9 Wenzell had called on Dodge and raised with him the problem of Wenzell's continued attachment to the Bureau, as he had been instructed to do by Hughes. Dodge had pointed out to Wenzell that "at the present time, there was no proposal that could be used for a basis of negotiation, and Dodge felt that there would be no definite period of negotiations and that many preliminary demands would have to be obtained before the question of financing would arise. However, Dodge told Wenzell that there was any likelihood that First Boston might participate in any financing which developed in the future, that he should finish his work with the Bureau as quickly as possible. Wenzell replied that he would terminate his work with the Bureau soon" (F. 85, R. 94-95).

At the same conference with Dodge "Wenzell stated that he was not qualified to advise the Bureau on the matter of all costs and suggested that Dodge make arrangements to obtain the services of Francis L. Adams, Chief of

the Bureau of Power, Federal Power Commission" (F. 85, R. 95).

That Wenzell did what Dodge told him to do—finish his work with the Bureau as quickly as possible—is established. On that same day, March 9, Wenzell attended a meeting at the Bureau at which an analysis of the sponsors' proposal of February 25, prepared jointly by the AEC and TVA, was discussed. Wenzell joined in the general opinion that the estimates of cost were too high and was asked to speak to the sponsors in order to "determine whether the sponsors would submit a better proposal" (F. 84, R. 94). Thereafter, Wenzell attended two more meetings at the Bureau, on March 11 and 16, at which the joint AEC-TVA analysis was further discussed. On the latter date, Wenzell again suggested that Adams be brought in (Fs. 87, 89, R. 96-97).

The meeting of March 16, held one week after Wenzell's conversation with Dodge, really marked the end of Wenzell's active participation as a Budget Bureau consultant. On March 19, 1954, Adams took over from Wenzell (F. 91, R. 98-99). On March 22, Hughes, upon returning to Washington from a trip, telephoned Wenzell "to make sure that he (Wenzell) had turned everything over to Adams" (F. 92, R. 99). The next day, "Wenzell went to Washington and saw Hughes, who made an appointment for Wenzell to talk to Adams the same day." Wenzell had a discussion with Adams and returned to New York the same evening (F. 92, R. 94-95).

Although thereafter there were a few telephone calls, Wenzell did no further work for the Bureau after this date except to attend two meetings in Washington on April 3 at the request of the Bureau (Fs. 94, 97, 98, R. 99-101).

Thus, it is evident that as a direct result of the "expressions of concern" by the sponsors to Wenzell's Government superiors, both Wenzell and his Government supe-

rriors took steps to terminate his consultancy as soon as possible without interfering with turning over of his duties to Adams. And this was accomplished three months before the President decided to have negotiations commence, and over seven months before the contract was agreed upon and executed.

In view of these undisputed facts, it comes as a distinct shock to read the Solicitor General's statement, at page 76 of petitioner's brief, that "Respondent has little ground upon which to claim credit for Wenzell's withdrawal from the transaction *after* [sic] the acceptability of their proposal was established" (Emphasis in original). The Findings show that the sponsors brought about Wenzell's withdrawal before the sponsors' proposal that furnished the starting point for negotiations had even been drafted.

As we read petitioner's brief, its contention is that when private citizens are requested to assist the Government in carrying out its policies, it is not enough that they do so in a fair and honorable manner. They must assume the burden of acting as wet-nurse to the Government officials with whom they are dealing, and see to it, *at their peril*, that those officials make no mistakes, even though they may be among the highest ranking officials in our Government, responsible directly to the President. We find it difficult to believe that the Solicitor General seriously contends that this is the policy of our Government, or that it would be in the public interest if it were, particularly in view of his own departmental regulations.

But in any event, the Government officials involved in this case performed their duties effectively and successfully. It appears to be an important part of the Government's contention that the "conflict" was not successfully "removed." It suggests that the failure of Hughes and

Dodge to fire Wenzell forthwith when the matter was first brought to Hughes' attention on February 23 constituted an attempt by them to "waive" §434. This is manifestly absurd. It was true at that time, as both Hughes and Dodge pointed out, that the problem was being exaggerated. For there was in fact "no proposal that could be used for a basis of negotiation" before the Government at that time, and there would not be one for some time to come. Dodge and Hughes were perfectly familiar with what Wenzell was doing, and were undoubtedly aware that Wenzell's participation as a consultant to the Bureau during the exploratory discussions as to the feasibility of the project did not constitute any violation of law or any improper activity on his part. What they did was not an attempt to "waive" §434. They took appropriate and successful administrative steps to prevent any possibility of its violation without interfering with the progress of the exploratory discussions. That is just what the departmental regulations now prescribe.

Petitioner also complains that "despite their professed concern, the sponsors utilized to the full the services of First Boston made available to them by Wenzell; they dealt with First Boston through Wenzell, and actually retained it as financial agent before their proposal was accepted by the Government as a basis for negotiating a firm contract" (Pet. Br., p. 76). We would point out that during the period of Wenzell's Government consultancy, the only service of First Boston, made available through Wenzell or otherwise, that the sponsors are found to have "utilized," was the securing of First Boston's predictions as to probable interest rates, and that in getting these predictions for both the sponsors and the Bureau Wenzell was complying with instructions of Hughes, his Government superior (F. 55, R. 76).

Finally, petitioner intimates that Hughes and Dodge were negligent in not consulting the Attorney General (Pet. Br., p. 66). If all the facts, including the true nature of Wenzell's employment by the Bureau, had been submitted to the Attorney General by Hughes and Dodge on February 23, we submit that he would have advised that they take precisely the course they did take: tell Wenzell to wind up his activities and withdraw before any problem of conflict could arise. For that would have been in accordance with what his Department, as well as the AEC and the Bureau of the Budget, now prescribe as the proper course to pursue in such a situation, and the unanimous Findings show this is precisely what happened.

In the case at bar, petitioner's position is, as stated by the court below, "essentially cynical" (R. 17). For, in the last analysis, its entire case rests on the proposition that it is against public policy to carry out the procedures prescribed by the highest legal officer in the Government.

V.

In any event, respondent is entitled to recover the reasonable cost of its services as found by the court below, since the direct result of those services was to save petitioner a capital expenditure of over \$100,000,000.

Petitioner concedes that "a recovery *quantum valebat*, as on an implied contract, may be available to a plaintiff whose express contract is unenforceable because infected by a conflict-of-interest" (Pet. Br., p. 79). But petitioner argues that this remedy is not available to respondent because "in this case, the United States received nothing and retains nothing under the arrangement with respondent" (Pet. Br., p. 80).

This is simply not true unless the policy decision by the President of the United States of what the United States wanted to receive is to be disregarded. As the court below found, it was basic Administration power policy that the expenditure of over \$100,000,000 of federal funds on the construction by TVA of a plant at Fulton, Missouri was to be avoided if possible (Fs. 22, 23, 36, R. 56-57, 63).^{*} It is plain from the Findings in this case that as a direct result of what respondent did, the Administration policy was accomplished and the taxpayers of the United States were saved this expenditure.

We are not arguing the wisdom or unwisdom of the Administration's policy. We say only that the policy was established, and it was the efforts of respondent which permitted the Administration to realize its policy objectives.

It is irrelevant in this respect that a third party, the City of Memphis, later made unnecessary the supply of power under this contract; the contract had already accomplished its intended result. The Government got what it wanted, and it should not now be permitted to welsh on its obligation to pay the cost of achieving its object.

As the unanimous Findings show:

"The defendant offered no evidence that plaintiff had failed to perform any of the obligations set forth in these provisions [of the contract]. The undisputed evidence establishes that at the time the defendant terminated the contract, plaintiff had performed such obligations imposed upon it by the contract in all

^{*}Not even petitioner's brief suggests that Wenzell had anything to do with this policy. On the contrary, it is expressly conceded that he did not (Pet. Br., p. 10). In fact, as is shown by petitioner's brief (Pet. Br., p. 10), Wenzell was not recalled until the Government had determined to seek power from private companies, including Middle South Utilities, Inc., one of the sponsors.

instances where performance was timely, or that it was proceeding diligently toward performance" (F. 17, R. 55).

The judgment below was that respondent should recover the costs involved in such performance, and judgment was entered for the amount of those costs as determined by the court. That judgment was sound and serves the public interest by upholding the enforceability of good faith contracts with the United States.

Conclusion.

The judgment of the Court of Claims herein should be affirmed.

Respectfully submitted,

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